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In The

Supreme Court of the United States

October Term, 1998

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Petitioner,

v.

TOMMY G. THOMPSON, Governor of the State of Wisconsin; GEORGE E. MEYER, Secretary, Wisconsin Department of Natural Resources; JAMES T. ADDIS, Administrator, DNR Division of Resource Management; JOHN E. FRYATT, Administrator, DNR Division of Enforcement; HERBERT F. BEHNKE, TRYGBE A. SOLBERG, NEAL W. SCHNEIDER, BETTY JO NELSEN, MARY JANE NELSON, JAMES E. TIEFENTHALER, JR., and STEPHEN D. WILLETT, Members, Wisconsin Natural Resources Board,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

BRUCE R. GREENE
Counsel of Record

M. CATHERINE CONDON
GREENE, MEYER & MCELROY, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
(303) 442-2021

JAMES M. JANNETTA
523 Ashmun Street
Sault Ste. Marie, Michigan 49783
(906) 635-6050

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

In the Treaty with the Menominee, February 8, 1831, 7 Stat. 342, paragraph Sixth, the United States promised that certain lands in what is now the State of Wisconsin "will remain to them as heretofore, for a hunting ground, until the President of the United States, shall deem it expedient to extinguish their title." App. 171. The Menominee Tribe brought suit against various Wisconsin officials alleging that its rights under this treaty provision still exist. The district court granted judgment on the pleadings dismissing the action, and the Seventh Circuit affirmed. The questions presented are:

1. Whether, in a suit involving the interpretation of Indian treaties, a dismissal on the pleadings based on the treaty language alone deprived the Tribe of the right to develop a factual record of the historical circumstances and the understanding of the parties under rules of treaty construction developed by the Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979), *Jones v. Meehan*, 175 U.S. 1 (1899), and numerous other cases.

2. Whether the lower courts' holdings that a later treaty extinguished the Menominees' rights is contrary to the Court's construction of the same treaty in *Wisconsin v. Lane*, 245 U.S. 427 (1918).

RULE 29.6 LISTING

None of the parties to the proceedings are corporations. Therefore, there are no parent or subsidiary corporations to be listed.

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PETITION FOR WRIT OF CERTIORARI

The Menominee Indian Tribe of Wisconsin ("the Tribe"), a federally recognized Indian tribe, as provided by the Menominee Restoration Act, 25 U.S.C. §§ 903-903f, respectfully petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in order to review its judgment in this case.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 161 F.3d 449 (7th Cir. 1998), and reprinted in the appendix hereto ("App.") at 1. That opinion affirmed the following orders and rulings of the district court, which are also reprinted in the appendix: *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F. Supp. 184 (W.D. Wis. 1996) (*"Menominee I"*), App. 31; *Menominee Indian Tribe of Wisconsin v. Thompson*, 943 F. Supp. 999 (W.D. Wis. 1996), *aff'd*, 161 F.3d 449 (7th Cir. 1998) (*"Menominee II"*), App. 96; and *Menominee Indian Tribe of Wisconsin v. Thompson*, No. 95-C-0030-C, (W.D. Wis. 1996) (order denying rehearing) (*"Menominee III"*), App. 148.

JURISDICTION

The court of appeals entered its judgment on November 17, 1998. 161 F.3d 449, App. 1. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., art. I, § 8, cl. 3, App. 162; U.S. CONST., art. VI, cl. 2, App. 162; Treaty with the Menomonees, February 8, 1831, 7 Stat. 342, *supplemented*, February 17, 1831, 7 Stat. 346, *amended*, October 27, 1832, 7 Stat. 405 ("1831 Treaty"), App. 163; Treaty with the Menomonies, September 3, 1836, 7 Stat. 509 ("1836 Treaty"), App. 190; Treaty with the Menomonee Tribe of Indians, October 18, 1848, 9 Stat. 952 ("1848 Treaty"), App. 199; and Treaty with the Menomonee Indians, May 12, 1854, 10 Stat. 1064 ("1854 Treaty"), App. 205.

STATEMENT OF THE CASE

I. INTRODUCTION.

This case concerns the continued existence of hunting, fishing, trapping, and gathering rights secured to the Tribe by federal treaty. The decisions below hinged on the construction of four treaties. The district court, affirmed by the Seventh Circuit, dismissed the case on a threshold motion based upon the language of the treaties alone, ignoring the Tribe's proffered evidence. 943 F. Supp. at 1023, App. 147. This process violated the Court's unvarying practice of deciding Indian treaty cases upon a full record of the historical context and the understanding of the parties, and particularly of the Indians. This practice, embodied in canons of Indian treaty construction articulated by the Court over a century ago, has been followed consistently by lower courts until this case was decided. In departing from this procedure, the lower courts

ignored completely the Court's own contrary interpretation of one of the key treaties involved.

II. JURISDICTION IN THE DISTRICT COURT.

The Tribe filed suit in the district court for the Western District of Wisconsin against the Governor and certain State officials in the Wisconsin Department of Natural Resources, seeking a declaration that the Tribe retained usufructuary rights to hunt, fish, trap and gather in a portion of north central and northeastern Wisconsin. The Tribe invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1362 (Indian tribes/federal question), and 28 U.S.C. § 1343(a)(3) (deprivation of civil rights under color of state law). The Tribe contended that its rights, reserved under its 1831 Treaty with the United States, were not abrogated by later treaties in 1836, 1848 and 1854.[1]

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[1] The Tribe averred that its reserved treaty rights pertained only to open lands and waters otherwise available for the exercise of usufructuary rights, and did not extend to private lands. The Tribe also averred it could exercise its rights free from state jurisdiction and control. However, the Court has held that states may regulate federal reserved treaty rights for legitimate conservation purposes, so long as those regulations do not discriminate against the Indians and are otherwise reasonable. *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968); *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973); *Fishing Vessel Ass'n*, 443 U.S. 658. Issues about the nature and extent of State regulation were not reached below.

III. TREATY HISTORY.

Under the 1831 Treaty, App. 163, the Tribe and the United States resolved certain disputes regarding lands traditionally occupied by the Menominee. The Treaty began with a description of the land and water area the Tribe traditionally claimed as its exclusive aboriginal territory. App. 214, Map 4. Within this area of exclusive use, the Tribe ceded two separate tracts of land. App. 215, Map 6; App. 216, Map 8. With respect to the balance of the lands within the Menominee area of claim – all of such lands lying west of the Fox River – the United States promised the Tribe that said lands "will remain to them as heretofore, for a hunting ground, until the President of the United States, shall deem it expedient to extinguish their title." App. 171, ¶ Sixth.

The next Menominee treaty in 1836 ceded a tract of land in the northeastern portion of the area of the Tribe's exclusive use. App. 190; App. 217, Map 9. The 1836 Treaty was silent with respect to the usufructuary rights reserved by the Tribe under the 1831 Treaty, and thus did not purport to abrogate those rights.

After the 1831 Treaty, the treaty most critical to the Menominee claim is the 1848 Treaty, under which the Tribe ceded all its remaining lands in Wisconsin. App. 199, art. II.[2] In consideration for the land cession in the

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[2] The treaty language provides: "The said Menomonee tribe of Indians agree to cede, and do hereby cede, sell, and relinquish to the United States all their lands in the State of Wisconsin wherever situated." App. 199, art. II.

1848 Treaty, the United States promised the Menominee a tract of land at least 600,000 acres in size in Minnesota, to which the United States anticipated the Tribe would move. However, the treaty contains no promise by the Menominee to remove to this land in Minnesota. Instead, it provides that the United States will pay the expenses of a delegation of tribal members "to explore and examine their new country," App. 202, art. VI, as an inducement to early removal. The Menominee were steadfastly opposed to removal and were angry about and frustrated by the 1848 Treaty.

The 1848 Treaty also provided a right of continued use and occupancy of the ceded lands in these terms: "It is agreed that the said Indians shall be permitted, if they desire to do so, to remain on the lands hereby ceded for and during the period of two years from the date hereof, and until the President shall notify them that the same are wanted." App. 203, art. VIII. The Court construed this language in *Lane*, 245 U.S. 427, 429, to mean that the Menominee could remain in Wisconsin for at least two years, and longer if given permission to remain by the President. Both the Tribe and the United States acted consistently with this understanding.

The Menominee petitioned the President for permission to remain in Wisconsin in August of 1850. *Id.* In September, the President gave the Tribe permission to remain in Wisconsin until June 1, 1851, and then further extended such permission until October 1, 1852. *Id.* at 429-30. In August, 1852, Congress appropriated money sufficient to relocate the Tribe to an area in Wisconsin on the Wolf and Oconto Rivers within its area of exclusive

use defined in the 1831 Treaty. Two years later the 1854 Treaty formally set aside that area as the Tribe's permanent homeland. *Id.* at 431. App. 220, Map 13. In February, 1853, the Wisconsin Legislature adopted a resolution consenting to the Menominee remaining in Wisconsin and settling on the same tract of land on the Wolf and Oconto Rivers for which Congress had appropriated money for their relocation. *Id.* at 430. Later, in 1853, the Commissioner of Indian Affairs recommended that the Menominee be permanently settled in Wisconsin on this land. *Id.* at 431.

The 1854 Treaty, which formalized this recommendation described itself as "supplementary and amendatory" to the 1848 Treaty. App. 205. The treaty noted that because of the "great unwillingness on the part of said Indians to remove," App. 206, the President had allowed the Tribe to remain in Wisconsin. This arrangement was made permanent by securing for the Tribe the land in Wisconsin referred to by both Congress and the Wisconsin Legislature "for a home, to be held as Indian lands are held . . . ." App. 207, art. II. The Tribe gave up its claim to the Minnesota lands in return for its permanent home in Wisconsin. *Id.* Thus, removal of the Tribe was abandoned and its temporary occupancy in Wisconsin was made permanent. *Lane*, 245 U.S. at 432-34. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

Both the 1848 and 1854 Treaties, like the 1836 Treaty, were silent with respect to the usufructuary rights

reserved by the Tribe in the 1831 Treaty, and did not purport to abrogate those rights.[3]

IV. DISTRICT COURT DISPOSITION.

The district court initially denied a motion to dismiss for failure to state a claim filed by the defendants, following traditional rules relating to such motions. 922 F. Supp. at 217, App. 95. However, a few months later the court inexplicably changed its position and granted the motion to dismiss, relying on its own interpretation of the treaties, while ignoring six volumes of lengthy expert reports and hundreds of historical documents that had just been filed by the Tribe under the court's pre-trial scheduling order. 943 F. Supp. at 1023, App. 147.

By dismissing the case on a threshold motion well before trial (indeed, well before any significant discovery took place), the district court ignored the canons of construction and the Court's interpretation of the 1848 Treaty in *Lane*. The district court thus deprived the Tribe of the opportunity to present evidence of the historical context of the treaties and the understanding of the parties that is essential to interpreting the treaties under venerable principles of interpretation articulated by the Court. The Tribe is aware of no court in the annals of American jurisprudence that has

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[3] The Tribe made a number of claims for treaty-secured and aboriginal usufructuary rights based upon this treaty history. The disposition by the lower courts, which hinged upon the 1831 Treaty and the 1848 Treaty, render a full explanation of such claims unnecessary for purposes of this petition.

dismissed a similar case on a threshold motion without the benefit of such a record.

V. COURT OF APPEALS DISPOSITION.

The court of appeals affirmed the district court's dismissal of the Tribe's suit. 161 F.3d at 452, App. 2. The court incorrectly concluded that the district court was free to dismiss the Tribe's complaint based upon the so-called "clear and unambiguous language of the four treaties," 161 F.3d at 456, App. 13, without the benefit of any historical materials or experts' testimony regarding the Indians' understanding of the treaties. For example, addressing the 1831 Treaty, the court acknowledged that treaty-reserved usufructuary rights are not generally dependent upon title, but then concluded based upon the treaty language alone that the 1831 Treaty rights were tied to title. 161 F.3d at 460, App. 22. The court concluded that since title to the lands was extinguished by the 1848 Treaty, the Tribe's use rights were lost at that time. 161 F.3d at 460, App. 22-23. The court also found no ambiguity in the 1831 Treaty phrase "until the President . . . shall deem it expedient" to extinguish their title, and concluded that the historical context and Menominee understanding of the treaty was "irrelevant" to the issue. 161 F.3d at 460, App. 23.

The appeals court also concluded that "[t]he 1848 Treaty forecloses any claim of usufructuary rights reserved under the 1831 Treaty," 161 F.3d at 458, App. 17, because the 1848 Treaty was a removal treaty. In the appeals court's view, because the Tribe ceded Wisconsin lands in exchange for a new reservation in Minnesota, it

would have been unreasonable for it to expect its members would be able to hunt and fish on the Tribe's former Wisconsin lands. The appeals court based its conclusion solely on the language of the 1848 Treaty and not upon any historical evidence whatsoever.

REASONS FOR GRANTING THE PETITION

The lower courts decided an important federal law question in a manner that conflicts with decisions of this Court which are directly on point. The lower court's rulings incorrectly apply the Court's oft recited canons of treaty construction, which Indian tribes and state governments have long relied upon in addressing questions of treaty interpretation. This flagrant disregard of the Court's teaching in the field of federal Indian law has resulted in an egregious decision by the appeals court in which it relied almost exclusively on the literal words of the treaties and characterized the Tribe's understanding of those treaty words as "irrelevant." 161 F.3d at 460, App. 23.

Further, the lower courts simply ignored the Court's controlling construction of the 1848 Treaty in *Lane*, including its recitation of official federal actions after 1848 under which the Menominee continued to occupy, hunt, and fish on the ceded lands *as provided for in the treaty* until they secured a permanent home in Wisconsin in 1854.

For these reasons, the Court should grant the petition and correct this important federal law question. If allowed to stand, the lower courts' decisions will result in

unsettling long-standing rules regarding treaty interpretation and will likely lead to new litigation between tribes and states in this contentious field.

I. DISPOSITION OF THE CASE ON A THRESHOLD MOTION TO DISMISS DEPRIVED THE TRIBE OF THE RIGHT TO DEVELOP THE FULL RECORD REQUIRED BY THE COURT'S CANONS OF TREATY CONSTRUCTION.

A treaty, whether with a foreign nation or an Indian tribe, is a specialized form of contract. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). During the past century and a half, the Court consistently has applied special rules to the interpretation of treaties between the United States and Indian tribes. First and foremost, treaties must be interpreted as the Indians understood them. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) (McLean, J., concurring) ("How the words of the treaty were understood by these unlettered people, rather than their critical meaning, should form the rule of construction."). Because the United States had disproportionate bargaining power in the treaty negotiation process, it has a special responsibility to avoid taking advantage of the Indian signatories. *Fishing Vessel Ass'n*, 443 U.S. at 675-76 ("[T]he United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side.").

Treaties were written in English by technical scriveners. Tribes, such as the Menominee, had an oral, rather than written, tradition. Because of these different

backgrounds and experiences, treaties "must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would be naturally understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 11 (1899)(citations omitted). *See also United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116 (1938) (Treaties "are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them.") (citations omitted); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942) ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.") (citations omitted); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970) ("The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent.").

A second canon requires that courts resolve doubtful expressions in treaties in favor of the Indians. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973) ("But the document [the treaty] is not to be read as an ordinary contract agreed upon by parties dealing at arm's length with equal bargaining positions."); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection

and good faith."); *Air France v. Saks*, 470 U.S. 392, 396 (1985), (Treaties " 'are construed more liberally than private agreements, and to ascertain their meaning [a court] may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.' " (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943)); *Winters v. United States*, 207 U.S. 564, 576-77 (1908); *Arizona v. California*, 373 U.S. 546 (1963).

The canons of construction require a full examination of the historical context of the treaties and the understanding of the parties, and particularly of the Indians. A court cannot simply pick up the document, a century and a half old, a product of another time and place, and proclaim its meaning from the language alone, or from a few selected documents. The development of a full record is required to give the canons of construction meaning and the treaties life. DAVID H. GETCHES, ET AL., FEDERAL INDIAN LAW 873 (4th ed. 1998). The Tribe had retained six experts from the fields of history, ethnohistory, anthropology, archaeology, and linguistics who had prepared reports and collected hundreds of supporting documents.

Yet the district court disposed of the case by granting judgment on the pleadings dismissing the action, 943 F. Supp. at 1023, App. 147, and the court of appeals affirmed. 161 F.3d at 462, App. 29. In so doing, the court of appeals made a fundamental error in its interpretation of the 1831 and 1848 Treaties without the benefit of a factual record. It construed the use rights reserved on the west side of the Fox River to be tied to the underlying title to the lands, and then read the 1848 Treaty as extinguishing those rights when the Tribe ceded "all their

lands in the State of Wisconsin wherever situated." App. 199, art. II; 161 F.3d at 458, App. 17 (quoting 1848 Treaty). This conclusion was based solely on its interpretation of the words of the two treaties. In other words, it construed particular words of the treaties in a technical sense, as "learned lawyers" would do, but not in the sense in which they would be naturally understood by the Menominee. *Jones v. Meehan*, 175 U.S. at 11.

Furthermore, the appeals court ignored the Tribe's contention that the use rights and the underlying ownership of the land to which the use rights pertain are severable. Indeed, the Tribe contended that the use rights are not interests in land, but rather qualified immunities from state regulation. The Court has held unmistakably that treaty reserved use rights survived in the Tribe notwithstanding Congress' termination of its reservation, *Menominee Tribe*, 391 U.S. 404, and has stated that "[w]e agree with the Court of Appeals that Indians may enjoy special hunting and fishing rights that are independent of any ownership of land . . . . " *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765-66 (1985). Notwithstanding that this principle is a matter decided by previous holdings of the Court, the court of appeals reached the opposite conclusion based solely upon its technical and crabbed reading of the words of the treaties.

The court of appeals was unabashed in reaching its conclusion, and said:

> [T]he question is whether the terms of the treaty inextricably joined the Tribe's usufructuary rights to the Tribe's title to the land, and thus

> whether those usufructuary rights were extinguished when the Tribe ceded its title to the land. For purposes of this analysis, the Tribe's understanding of "expedient" *is irrelevant*.

161 F.3d at 460, App. 23 (emphasis added). A more flagrant disregard of the canons of construction is hard to imagine.

A second fundamental error made by the district court and the court of appeals was their failure to allow the Tribe to make its record regarding the Menominee understanding of the treaties when they dismissed the Tribe's complaint. In the context of a motion to dismiss, it is virtually impossible to examine the historical record underlying the treaty transaction in order to discern the intent of the parties.

It is noteworthy that in *Fishing Vessel Ass'n*, although the Court stated that "[i]n our view, the purpose and language of the [Stevens'] treaties are unambiguous," 443 U.S. at 679, it reached that conclusion based upon an exhaustive record developed in the district court. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). Examples of other cases in which district courts developed a full examination of the parties' intent regarding the history of treaties, the negotiation process and the practical construction of the parties include *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd in part*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981), and *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784 (D. Minn. 1994), *aff'd*, 124 F.3d 904 (8th Cir. 1997), *cert. granted*, 118 S.Ct. 2295 (June 8, 1998) (No. 97-1337). Indeed, after diligent search, the

Tribe has been unable to find any treaty interpretation case substantially similar to the case at bar that was ever dismissed without the benefit of a trial or a summary judgment motion through which a tribe was afforded the opportunity to develop a historical record to determine the intent of the parties.[4]

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[4] *See e.g., United States v. Choctaw Nation*, 179 U.S. 494 (1900); *United States v. Winans*, 198 U.S. 371, 379 (1905); *Alaska Pac. Fisheries Co. v. United States*, 248 U.S. 78, 86 (1918); *Seufert Bros. Co. v. United States ex rel. Confederated Tribes & Bands of Yakima Indians & Nations*, 249 U.S. 194, 197 (1919); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 424 (1943); *Puyallup Tribe v. Department of Game*, 391 U.S. 392; *Menominee Tribe*, 391 U.S. 404; *Montana v. United States*, 450 U.S. 544 (1981); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 329-30 (1983); *South Dakota v. Bourland*, 508 U.S. 679, 684-86 (1993); *Seufert v. Olney*, 193 F. 200, 201 (E.D. Wash. 1911); *Mason v. Sams*, 5 F.2d 255 (W.D. Wash. 1925); *United States ex rel. Charley v. McGowan*, 62 F.2d 955, 955-56 (9th Cir.), *aff'd. sub nom. United States v. Bakers Bay Fish Co.*, 290 U.S. 592 (1933); *Whitefoot v. United States*, 293 F.2d 658, 661 (Ct. Cl. 1961), *cert. denied*, 369 U.S. 818 (1962); *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169, 170 (9th Cir.), *cert. denied*, 375 U.S. 829 (1963); *Settler v. Lameer*, 507 F.2d 231, 232-33 (9th Cir. 1974); *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 409-10 (9th Cir. 1976); *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n*, 588 F.2d 75, 77 (4th Cir. 1978), *cert. dismissed*, 446 U.S. 960 (1980); *Confederated Tribes of the Colville Indian Reservation v. Washington*, 591 F.2d 89, 90 (9th Cir. 1979); *Cheyenne-Arapaho Tribes of Okla. v. Oklahoma*, 618 F.2d 665, 666 (10th Cir. 1980), *aff'd*, 681 F.2d 705 (10th Cir. 1982); *Russ v. Wilkins*, 624 F.2d 914, 915 (9th Cir. 1980), *cert. denied*, 451 U.S. 908 (1981); *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129, 1132 (8th Cir.), *cert. denied*, 459 U.S. 1070 (1982); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied sub nom. Besadny v. Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 464 U.S. 805 (1983); *Lower Brule Sioux Tribe v. South*

A recent case now pending before the Court, *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, No. 97-1337 (1998), involves issues similar to those in this case and illustrates the importance of interpreting treaties on a full record. *Mille Lacs* concerns usufructuary rights on land ceded by the Chippewa in Wisconsin and Minnesota that adjoins the Menominee country to the west and north. The treaty provided that usufructuary rights on the ceded lands were "guarantied [sic] to the Indians, during the pleasure of the President . . . . " Treaty of July 29, 1837, art. 5, 7 Stat. 536. In 1850, President Zachary Taylor signed an executive order purporting to revoke those rights. Exec. Order (Feb. 6, 1850). In 1855 one of the Chippewa bands involved in the 1837 treaty signed a further treaty "fully and entirely" relinquishing and conveying to the United States "any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." Treaty of Feb. 22, 1855, art. I, 10 Stat. 1165.

Based upon an extensive record of the historical background of the treaties and the understanding of the

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Dakota, 711 F.2d 809, 812 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984); *United States v. Felter*, 752 F.2d 1505, 1507 (10th Cir. 1985); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 743 (10th Cir. 1987); *United States v. Oregon*, 913 F.2d 576, 578 (9th Cir. 1990), *cert. denied sub nom. Makah Indian Tribe v. United States*, 501 U.S. 1250 (1991); *Sohappy v. Smith*, 302 F. Supp. 899, 903-904 (D. Or. 1969); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1002 (D. Minn. 1971); *United States v. Washington*, 384 F. Supp. 312, 327, 329; *United States v. Michigan*, 471 F. Supp. at 203-204; *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1122-23 (D. Minn. 1994).

parties, the lower courts concluded that the 1837 treaty rights were neither interests in land nor dependent upon title, and that the rights were neither extinguished by the 1850 order nor the 1855 treaty. *Mille Lacs*, 861 F. Supp. 784.[5] An *a priori* interpretation of the treaty language alone, shorn of its historical context and evidence of the understanding of the parties, such as the approach taken by the lower courts in this case, could well have led to a different – and wrong – result.

The similarity between the cases, and particularly the similarity between the language of the 1855 treaty at issue in *Mille Lacs* and the 1848 Treaty in this case, coupled with the opposite approaches to treaty interpretation taken by the lower courts in the two cases, suggest that this case should be remanded for further proceedings after the Court decides *Mille Lacs*.

II. THE DECISIONS BELOW CONFLICT WITH THE COURT'S INTERPRETATION OF THE 1848 TREATY IN *WISCONSIN V. LANE*.

The lower courts, without benefit of a factual record, erred in concluding that the Tribe's 1831 Treaty rights were title-dependent. They compounded the error when they dealt with the 1848 Treaty. Not only was there no

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[5] The Seventh Circuit, in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, reached the same result involving the same treaty rights, except the 1855 treaty was not in issue.

factual record, but the decisions below are directly contrary to the Court's own construction of the 1848 Treaty in *Lane*, 245 U.S. 427. The lower courts did not attempt to distinguish or harmonize *Lane*; they simply ignored it, even though the Tribe relied upon it in several briefs. It is not mentioned or even cited in the Seventh Circuit decision.[6]

As the district court noted, "[t]he critical treaty is the one signed in 1848." *Menominee III*, slip op. at 9, App. 155. The courts below held that the 1848 Treaty effected an *in praesenti* termination of the usufructuary rights when it was signed. This was based on the courts' construction of the 1831 Treaty rights as dependent on title, and of the 1848 Treaty as an obligatory removal treaty that ended all Menominee rights in Wisconsin. 943 F. Supp. 1014-16, App. 125-31; *Menominee III*, slip op. at 9-14, App. 155-57; 161 F.3d at 458, App. 17-19. In reaching that result, the district court construed the 1848 Treaty proviso which allowed the Menominee to remain in Wisconsin "for and during the period of two years from the date hereof, and until the President shall notify them that the same are wanted," App. 203, as terminating the occupancy right automatically on the second anniversary of the treaty. 943 F. Supp. at 1015, App. 128. The removal theory embracing this interpretation was adopted by the Seventh Circuit as well. 161 F.3d at 458, App. 17-18.

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[6] It is cited in one of the district court opinions, but only as a source of historical background. 943 F. Supp. at 1015, App. 128.

The Tribe's position, backed by the experts' reports and accompanying documents filed pursuant to the district court's pretrial order, is this: the 1848 Treaty dealt only with land title, not usufructuary rights; the 1848 Treaty did not mandate removal, but only encouraged it; the proviso quoted above allowed the Menominee to remain in Wisconsin for at least two years, and indefinitely thereafter with federal permission; all parties acted upon that understanding; the Menominee remained in Wisconsin exercising their usufructuary rights with federal permission in accordance with the 1848 Treaty continuously thereafter; and the 1854 Treaty ended removal efforts once and for all without terminating the usufructuary rights secured by the 1831 Treaty.

In the Tribe's view, removal itself, if carried out, may have terminated the usufructuary rights, but the 1848 Treaty by itself did not do so *in praesenti*. This approach is supported by treaty history, the understanding of the parties, and *Williams v. City of Chicago*, 242 U.S. 434 (1917) (claim to land is lost by abandonment when a tribe is removed west).[7]

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[7] Despite repeated disclaimers from the Tribe, the lower courts persisted in their misconception that the Tribe claimed the 1848 Treaty was invalid for fraud. 161 F.3d at 458, App. 18-19. The Tribe never made such a claim. There was fraud involved in the treaty because the Menominee were deliberately misled by the treaty commissioners about the amount of land they were ceding. *See* App. 218, Map 10; App. 219, Map 12. They hired a lawyer to pursue a claim, and consequently the fraud became well known to federal officials. The circumstances (filtered through the eyes of federal officials) are described in the Annual Reports of the Commissioner of Indian Affairs for 1850 through 1852, in the record below as attachments to an

The Tribe's approach is also supported by the Court's interpretation of the 1848 Treaty in *Lane*, 245 U.S. 427, which is flatly inconsistent with the approach taken by the courts below. *Lane* forecloses any argument that the 1848 Treaty was an obligatory removal treaty that terminated all Menominee interests in Wisconsin the moment it was signed.

Lane involved an original suit in the Court by the State of Wisconsin claiming title to section 16 of each township of the Menominee Reservation established by the 1854 Treaty. The Enabling Act of Wisconsin, 9 Stat. 56 (Aug. 6, 1846), set aside section 16 of each township of public land in the state "for the use of schools." *Id.* § 7. The case turned on whether the section 16's within the reservation were outside the scope of the grant because they had been disposed of by the federal government prior to the survey of the reservation lands.

The Court held that title to the section 16's did not vest in the state because the federal actions between 1848 and 1852 had established a lawful continuous occupancy right in the Menominee:

> The Menominee Indians by the treaty of 1848 gave up their holdings in Wisconsin, but were not removed to the lands provided for them in the West. They had the privilege of remaining in Wisconsin for two years, and until notified by the President that the lands were

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amicus brief. The Tribe discussed the fraud as part of the historical context because it was relevant to the understanding of the parties of both the 1848 and 1854 Treaties, but not as part of any claim of treaty invalidity.

> wanted; this permission was extended, ultimately until October, 1852; in the meantime the Indians were located by the action of the Superintendent of Indian Affairs, and by the act of Congress, with the approval of the President, upon the reservation created in 1852. True, the act of Congress appropriating money for the removal referred to the temporary character of the location, but they were thus located subject to the control of Congress, and, as we have seen, with the consent of the state, if that were needed.
>
> *We think this recited action was a disposition, prior to survey, of the school sections, which was clearly within the authority of Congress to make* and sanctioned by the terms of section 7 of the Enabling Act. This action before survey took these lands out of the scope of the grant for school purposes, and made them subject to ultimate disposition by Congress for the benefit of the Indians. This was accomplished by the treaty of 1854. . . . The occupancy and rights of the Indians so established have never been terminated, and still continue.

Id. at 432-33 (emphasis added).

If the approach of the courts below had been followed in *Lane*, the state would have title to the section 16's. *Lane* clearly does not view the 1848 Treaty as an obligatory removal treaty that worked an *in praesenti* extinguishment of rights. Rather, *Lane* holds that the Tribe had occupancy (and therefore usufructuary) rights for a minimum of two years, and indefinitely thereafter with federal permission. This was the understanding of the

Indians and of the federal government which they consistently acted upon until the 1854 Treaty made the occupancy permanent. *Lane* concluded that the Menominee had continuous lawful occupation of the ceded lands after the 1848 Treaty, which of necessity had to be authorized by that treaty, or else that occupation would have been unlawful. If the 1848 Treaty did not operate to confer title to the section 16's upon the state, how then could it have operated to terminate the usufructuary rights, which were *not* related to title? Only by ignoring *Lane* could the lower courts rule as they did.

The approach below was also implicitly rejected by the Court in *Menominee Tribe*, 391 U.S. 404, which held that termination of the Menominee Reservation did not terminate the Tribe's hunting and fishing rights within its former boundaries.[8] The state argued that it could regulate Menominee hunting and fishing on the former reservation because its sovereign powers had attached to the land involved when it was ceded under the 1848 Treaty. In rejecting this argument, the Court declined to give the 1848 Treaty the absolute self-executing reading the lower courts adopted in this case. *Id.* at 411 n.12.

CONCLUSION

Over a century and a half ago, in a decision courageously rendered by the Court, Justice McLean wrote:

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[8] Federal supervision over the Tribe was terminated in 1954. Menominee Termination Act, 68 Stat. 250. The act was repealed and federal supervision, including reservation status, was restored in 1973. Menominee Restoration Act, 25 U.S.C. §§ 903-903f.

"How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832). Since then the Court has developed and consistently followed canons of Indian treaty construction that dictate the development of a full factual record on the circumstances surrounding the treaties and the understandings of the parties.

These are no mere technical rules, but ones that seek to ensure substantial justice. The courts below short-circuited the required process and dispensed with a factual record, thereby abandoning the promise of justice underlying the canons. They then compounded this fundamental error by ignoring contrary precedent of the Court.

The Court should grant review and reaffirm the fundamental principle of Indian law at stake here. At a minimum, and in the alternative, the Court should await the decision in *Mille Lacs*, and remand thereafter to the Seventh Circuit for reconsideration in light of that decision.

Respectfully submitted,

BRUCE R. GREENE
Counsel of Record

M. CATHERINE CONDON
GREENE, MEYER & MCELROY, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
(303) 442-2021

JAMES M. JANNETTA
523 Ashmun Street
Sault Ste. Marie, Michigan 49783
(906) 635-6050

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Petitioner,

v.

TOMMY G. THOMPSON, Governor of the State of Wisconsin; GEORGE E. MEYER, Secretary, Wisconsin Department of Natural Resources; JAMES T. ADDIS, Administrator, DNR Division of Resource Management; JOHN E. FRYATT, Administrator, DNR Division of Enforcement; HERBERT F. BEHNKE, TRYGBE A. SOLBERG, NEAL W. SCHNEIDER, BETTY JO NELSEN, MARY JANE NELSON, JAMES E. TIEFENTHALER, JR., and STEPHEN D. WILLETT, Members, Wisconsin Natural Resources Board,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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MENOMINEE INDIAN TRIBE OF WISCONSIN,
Plaintiff-Appellant,
v.
Tommy G. THOMPSON, et al.,
Defendants-Appellees.

Nos. 96-3596, 96-3985.

United States Court of Appeals,
Seventh Circuit.

Argued Oct. 21, 1997.

Decided Nov. 17, 1998.

Bruce R. Greene (argued), M. Catherine Condon, Greene, Meyer & McElroy, Boulder, CO; James M. Jannetta, Sault Ste. Marie, MI, for Plaintiff-Appellant in No. 96-3596.

Charles D. Hoornstra (argued), Office of the Attorney General, Wisconsin Department of Justice, Madison, WI, for Defendants-Appellees in No. 96-3596.

Bruce R. Greene (argued), Greene, Meyer & McElroy, for Plaintiff-Appellant in No. 96-3985.

John D. Niemisto, Charles D. Hoornstra (argued), Thomas L. Dosch, Office of the Attorney General, Wisconsin Department of Justice, Madison, WI; Philip Peterson, Wisconsin Department of Justice, Madison, WI, for Defendants-Appellees in No. 96-3985.

Charles G. Curtis, Jr., Foley & Lardner, Madison, WI, for Amicus Curiae in Nos. 96-3596 and 96-3985.

Before CUMMINGS, WOOD, JR., and COFFEY, Circuit Judges.

COFFEY, Circuit Judge.

The Menominee Indian Tribe of Wisconsin appeals the district court's dismissal of its lawsuit seeking a declaration of the Tribe's usufructuary rights on certain off-reservation lands set forth in a series of mid-nineteenth century treaties, as well as the enforcement of those rights by means of injunctive relief. The district court dismissed the lawsuit, concluding that the Tribe does not retain any aboriginal right to special treatment in hunting and fishing on off-reservation lands and that any off-reservation use rights reserved in the Treaty of 1831 were extinguished either by explicit conditions in that treaty or by removal provisions in subsequent treaties. We affirm.

I. BACKGROUND

A. The Treaty Process

Before addressing the claims presented in this appeal, we think it is both helpful and necessary to explain in detail the history of the treaty process between the United States and the Menominee Tribe. In 1831, the Menominee Indian Tribe and the United States signed a treaty resolving various disputes involving land in the state of Wisconsin that was traditionally used and occupied by the Menominee Indians. The Tribe agreed to "cede and forever relinquish to the United States, all their country [in Wisconsin] on the southeast side of Winnebago lake [sic], Fox river [sic], and Green bay [sic]." 1831 Treaty Art. Third, 7 Stat. 342, 343 (Feb. 8, 1831). The government intended to survey and sell the Wisconsin land east of the Fox River to white settlers. 1831 Treaty Art. Sixth. The Tribe also ceded a large tract of land west of the Fox River in the state of Wisconsin. 1831 Treaty Art.

First. The government wanted to relocate several tribes from New York to the state of Wisconsin and settle them on the Menominee lands west of the Fox River. The Treaty, however, provided that if the New York tribes did not occupy these lands, "such portion as would have belonged to said [New York] Indians, had it been occupied, shall revert to the United States . . . to be laid off by the President." 1831 Treaty Art. First. In exchange for the land, the government agreed to protect, pay and provide various goods and services[1] to the Menominee Tribe. See 1831 Treaty Arts. Third, Fourth, Fifth, and Sixth ¶ 3.

In the 1831 Treaty, the Tribe reserved the right to use the land ceded on the east side of the Fox for hunting and fishing. 1831 Treaty Art. Sixth at ¶ 1. Specifically, the Treaty states:

> The Menomonee [sic] tribe of Indians shall be at liberty to hunt and fish on the lands they have now ceded to the United States, on the east side of Fox river [sic] and Green bay [sic], with the same privileges they at present enjoy, until it be surveyed and offered for sale by the President; they conducting themselves peaceably and orderly.

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[1] For instance, the government agreed to: employ five farmers for ten years to teach tribe members how to cultivate their land; employ five women for ten years to instruct Menominee women "in the business of useful housewifery;" build and pay up to $13,000 for permanent houses for tribe members; supply $6,000 for the purchase of farm animals; erect a grist mill and employ a miller; provide and distribute clothing worth $8,000; establish a blacksmith and provide iron and steel for the smith; and to educate Menominee children. 1831 Treaty Arts. Fourth and Fifth.

> 1831 Treaty Art. Sixth at ¶ 1. Additionally, the Treaty reserved to the Tribe hunting rights in the Wisconsin land west of the Fox "until the President of the United States, shall deem it expedient to extinguish their title." 1831 Treaty Art. Sixth at ¶ 2. The parties do not dispute that the Wisconsin land east of the Fox was shortly thereafter surveyed and offered for sale to white settlers.

In 1836, the Tribe and the United States entered into another treaty, in which the Tribe ceded additional lands west of the Fox River. 1836 Treaty Art. First ¶¶ 1, 2, 7 Stat. 506, 506-507 (Sept. 3, 1836). The 1836 Treaty contains no explicit reservation of any use rights, but it provides that the Tribe would leave the ceded lands within one year of the treaty's ratification. 1836 Treaty Art. Fourth ¶ 1.

In 1848, the Tribe signed another treaty in which it agreed "to cede, . . . sell, and relinquish to the United States all [its] lands in the State of Wisconsin wherever situated." 1848 Treaty Art. II, 9 Stat. 952, 952 (Oct. 18, 1848). The United States, in exchange, agreed to give the Tribe at least 600,000 acres of land located in Minnesota[2]

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[2] The treaty does not explicitly locate the land in Minnesota because Minnesota had yet to be admitted to the Union. Rather, the Treaty describes the land as:

> all that country or tract of land ceded to the said United States by the Chippewa Indians of the Mississippi and Lake Superior, in the treaty of August 2, 1847, and the Pillager band of Chippewa Indians in the treaty of August 21, 1847, which may not have been assigned to the Winnebago Indians, under the treaty with that tribe of October 13, 1846, and which is guarantied [sic] to contain not less than six hundred thousand acres.

1848 Treaty Art. III.

and $350,000. 1848 Treaty Arts. III, IV. Further, the government agreed to finance a Menominee delegation "[t]o enable the said Indians to explore and examine their new country, and as an inducement to an early removal thereto." 1848 Treaty Art. VI. Article VIII provided:

> It is agreed that the said Indians shall be permitted, if they desire to do so, to remain on the land hereby ceded for and during the period of two years from the date hereof, and until the President shall notify them that the same are wanted.

The Menominee Tribe never left Wisconsin. Instead, in 1850, at the end of the two-year period, the Tribe requested and received the President's permission to remain temporarily on land located in Wisconsin at the Wolf and Oconto Rivers. 1854 Treaty Preamble at ¶ 2, 10 Stat. 1064, 1064 (May 12, 1854).

On May 12, 1854, the Menominee Tribe and the government signed their fourth and final treaty. The preamble to the 1854 Treaty describes the terms of the 1848 Treaty, stating that the Tribe ceded all of its land in the state of Wisconsin to the United States in exchange for land in Minnesota. 1854 Treaty Preamble at ¶ 2. It then recounts the "manifestation of great unwillingness on the part of said Indians to remove to the country west of the Mississippi River . . . and a desire to remain in the State of Wisconsin." 1854 Treaty Preamble at ¶ 3. Finally, the preamble states that the purpose of the Treaty is to assuage the Tribe's interest in establishing a permanent home in Wisconsin. 1854 Treaty Preamble at ¶ 4. To this end, the Menominee Tribe ceded their Minnesota lands (obtained in the 1848 Treaty) to the United States in exchange for a small reservation in Wisconsin at the

mouth of the Oconto and Wolf Rivers. 1854 Treaty Arts. 1, 2. In addition to providing funds for various goods and services, the government agreed to pay the difference between the value of the Minnesota land ceded by the Tribe and the value of the Wisconsin reservation granted by the government. 1854 Treaty Art. 4.

B. The Procedural History of this Case

The Menominee Tribe brought this lawsuit seeking a declaration of their usufructuary rights off-reservation The Tribe contended that the 1831 Treaty reserved their right to hunt and fish on the lands they ceded both to the east and west of the Fox River, and that the right to fish and hunt on those lands had not been terminated by any subsequent treaty or act of Congress. Additionally, the Tribe asserted that it retains aboriginal fishing rights in Lake Winnebago and along the Wisconsin shores of Lake Michigan and the Wisconsin River. Finally, the Tribe claimed the right to harvest sturgeon off-reservation to compensate for the decrease in on-reservation sturgeon populations. The Tribe requested an injunction ordering the defendants to allow Menominee Indians to exercise their alleged off-reservation usufructuary rights free from regulation by the State.

The defendants moved to dismiss the lawsuit, arguing that the Tribe should be judicially estopped from asserting usufructuary rights arising out of the 1831 Treaty based on positions taken by the Tribe in prior litigation, and that the Treaties of 1848 and 1854 terminated any treaty-reserved or aboriginal rights the

Menominee may have had on off-reservation lands. Additionally, the defendants argued that the 1831 Treaty, while reserving limited usufructuary rights for the Tribe, provided that certain events would extinguish or cancel those limited rights. Specifically, the defendants claimed that the terms of the 1831 Treaty limiting the Tribe's right to use the land east of the Fox River would terminate when the president offered the land for sale, and that the Tribe's right to use the land west of the Fox River was dependant upon having title to that land. The defendants contended that those terminating events (i.e. the president offered the land east of the river for sale and the Tribe ceded title to the land west of the river) occurred more than a century and a half ago and, therefore, the Tribe retains no off-reservation usufructuary rights. Finally, the defendants argued that the 1854 Treaty did not guarantee the Tribe any specific amount of sturgeon and, in any event, that the district court did not have the authority to grant the Tribe off-reservation fishing rights.

The district court judge granted the defendants' motion to dismiss. The district court dismissed the plaintiffs' sturgeon claim because it concluded that the Menominee Tribe reserve neither off-reservation fishing rights nor the right to a specific proportion of the sturgeon catch and, therefore, that the court did not have the authority to grant the relief requested. *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F.Supp. 184, 214-15 (W.D.Wis. 1996). The district judge concluded that the treaties were not ambiguous and therefore that the court was competent to interpret them. The court went on to hold that any usufructuary rights reserved in the 1831 Treaty were

explicitly limited by extinguishing events, and that those extinguishing events had occurred. The trial judge further found that the 1848 Treaty was a removal treaty[3] which extinguished every and any tribal right to use or occupy the Wisconsin lands. Finally, the court concluded that positions taken by the Menominee Tribe in earlier litigation did not judicially estop the Tribe from asserting retention of usufructuary rights. *Menominee Indian Tribe of Wisconsin v. Thompson*, 943 F.Supp. 999 (W.D.Wis. 1996).

II. ISSUES

On appeal, the Tribe maintains that the district court failed to heed the canons of construction for Indian treaties and improperly resolved ambiguous treaty language in favor of the defendants. Additionally, they claim that the district court converted the motion to dismiss into a motion for summary judgment by considering matters outside the pleadings and then improperly decided the case without allowing the Tribe to complete discovery and file rebuttal evidence. Finally, the Tribe renews the contentions presented in their complaint and in opposition to the motion to dismiss.

III. ANALYSIS

Before reaching the merits of the Tribe's claims, we must resolve two procedural matters. Initially, the defendants claim that the doctrine of judicial estoppel bars the

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[3] The phrase "removal treaty" refers to a treaty in which an Indian tribe agrees to leave its traditional lands and move to lands with which the tribe has no traditional ties.

Menominee from asserting continuing usufructuary rights to off-reservation lands based on contrary positions the Tribe assumed in prior litigation. Additionally, the Menominee Tribe asserts that the district court improperly converted the defendants' motion to dismiss into a motion for summary judgment. We are convinced that neither procedural contention has merit; therefore we evaluate the Tribe's substantive claims and affirm the district court's judgment.

A. Judicial Estoppel

The doctrine of judicial estoppel "provides that a party who prevails on one ground in a lawsuit cannot turn around and in another lawsuit repudiate the ground." *McNamara v. City of Chicago*, 138 F.3d 1219, 1225 (7th Cir. 1998). The doctrine thereby bars a party from obtaining two separate litigation victories, or a "double recovery," by asserting opposite legal or factual contentions in two separate legal actions based on the same underlying facts. *Ezekiel v. Michel*, 66 F.3d 894, 905 (7th Cir. 1995); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993). The defendants contend that the Menominee Tribe may not assert usufructuary rights off-reservation because in prior cases it took the position that the various treaties at issue in this case resulted in the cession of all "right, title, and interest in and to" their Wisconsin land. Specifically, the defendants point to several claims filed in the Indian Claims Commission in which the Tribe sought compensation for the cessation of "right, title, and interest" to off-reservation lands embodied in the 1848 and 1854 Treaties. These claims were later consolidated and settled for $8,500,000. *See Menominee*

Tribe of Indians v. United States, Nos. 44304, 44296, 44298, 44300, 44303, 44305, and 44306, 1951 WL 57 (Ct.Cl. July 13, 1951) (unpublished order) (ratifying and adopting settlement agreement between the parties). Additionally, the defendants maintain that, in a case decided by the Supreme Court in 1968, the Menominee alleged that in exchange for on-reservation usufructuary rights immune to state regulation the Tribe relinquished all right, title and interest to lands ceded in the 1831, 1836 and 1848 Treaties. *See Menominee Tribe of Indians v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968) (recognizing the Tribe's immunity from state hunting and fishing rules on reservation lands under the 1854 Treaty). The defendants argue that the position taken by the Menominee in this lawsuit (i.e., that the Tribe reserved off-reservation usufructuary rights) is opposite to the position taken by the Menominee in prior litigation (i.e., that the Menominee Tribe ceded all of its off-reservation rights).

The doctrine of judicial estoppel does not bar the Menominee contentions in this lawsuit. We agree with the district judge that it is not clear that the Menominee claims in the earlier cases are necessarily inconsistent with the position taken here. The 1968 Supreme Court case analyzed the Tribe's on-reservation hunting and fishing rights in light of a congressional act terminating federal supervision of the Tribe. *Menominee*, 391 U.S. at 407, 88 S.Ct. 1705. In considering that question, the Court interpreted the phrase, "for a home, to be held by them as Indian lands are held[,]" in Article 2 of the 1854 Treaty (establishing the Menominee reservation). The case had nothing to do with tribal use-rights on land the Menominee ceded to the United States. What is clear from the

Supreme Court's opinion is that the Menominee argued that the 1854 Treaty reserved their on-reservation use rights and subsequent congressional action did not abrogate those rights. We agree with the trial court's conclusion that the Menominee's position in the 1968 case does not bar the Tribe's assertions in this case.

Furthermore, the claims the Menominee presented to the Indian Claims Commission in the early 1950s do not warrant application of the judicial estoppel doctrine to this case. The issue before the Claims Commission involved compensation for land the Menominee ceded. The Menominee alleged that the United States had underpaid them for the title to their Wisconsin lands. The record does not contain any evidence revealing a claim of, or discussion about, use rights. Again, based on the record before us, it cannot be said with certainty that the parties to the Claims Commission litigation understood the Tribe's claims to encompass use rights, as opposed to occupancy rights or title to the ceded lands.

B. Conversion of Motion to Dismiss

The Tribe asserts that the district court did not comply with the dictates of Federal Rule of Civil Procedure 12(c), which provides, in part:

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

See also General Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080 (7th Cir. 1997) ("If a district court considers matters outside the pleadings, our procedural rules require that the motion shall be treated as one for summary judgment." (internal quotation omitted)). According to the Menominee, in deciding the motion to dismiss, the court considered materials external to the pleadings; namely, historical papers chronicling the treaty negotiations, an expert report, and other historical documents, such as the Tribe's 1850 letter to the President requesting permission to remain in Wisconsin, and some mid-nineteenth century reports of the Commissioner of Indian Affairs. The Menominee contend that the motion to dismiss was thus converted into a summary judgment motion, and that the court improperly decided the converted motion without allowing the Tribe an opportunity to present additional evidence supporting their allegations.

We are of the opinion that the trial court's consideration of the treaties at issue was proper. "[D]ocuments attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim." *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994); *see United States v. Wood*, 925 F.2d 1580, 1582 (7th Cir. 1991). Indisputably, the Menominee refer to the treaties in the complaint, and the treaties are central to the Menominee's claims. The treaties, therefore, were not materials "outside the pleadings."

The district court took judicial notice of the historical documents of which the Tribe complains. *Menominee*, 943 F.Supp. at 1004. A court may consider judicially noticed

documents without converting a motion to dismiss into a motion for summary judgment. *General Elec.*, 128 F.3d at 1080-81; *Doherty v. City of Chicago*, 75 F.3d 318, 324 n. 4 (7th Cir. 1996); *Wood*, 925 F.2d at 1582. Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper. *Papasan v. Allain*, 478 U.S. 265, 268 n. 1, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *General Elec.*, 128 F.3d at 1084; *Henson v. CSC Cred. Servs.*, 29 F.3d 280, 284 (7th Cir. 1994); *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (cited with approval in *Doherty*, 75 F.3d at 324 n. 4). Furthermore, "a dismissal that follows from consideration of extrinsic materials may also be affirmed if . . . dismissal would have been appropriate without reference to those materials." *Alioto v. Marshall Field's & Co.*, 77 F.3d 934, 936 n. 3 (7th Cir. 1996); *see also General Elec.*, 128 F.3d at 1084. As explained below, the district court's dismissal of the case was based on the clear and unambiguous language of the four treaties.

C. The Menominee Tribe's Substantive Claims on Appeal

The Menominee present three basic claims: that the 1831 Treaty reserved their use rights on land they ceded in that Treaty; that the 1854 Treaty reserved their right to a specific proportion of the sturgeon resource; and that the Tribe retains aboriginal use rights. The district court dismissed the lawsuit after concluding that the 1848 Treaty abrogated the 1831 treaty-reserved use rights, that the court was not authorized to grant the relief requested on the sturgeon claim, and that the Tribe's acceptance of

the 1854 reservation abrogated the Menominee's aboriginal use rights.

We review a district court's dismissal on the pleadings *de novo*. *Gutierrez v. Peters*, 111 F.3d 1364, 1368 (7th Cir. 1997); *GATX Leasing Corp. v. National Union Fire Ins. Co.*, 64 F.3d 1112, 1114 (7th Cir. 1995). Dismissal on the pleadings is proper when it appears beyond doubt that the plaintiff cannot prove any facts that would support a claim for relief. *Gustafson v. Jones*, 117 F.3d 1015, 1017 (7th Cir. 1997); *GATX Leasing*, 64 F.3d at 1114. In reviewing a district court's dismissal on the pleadings, we assume all well-pleaded facts are true and view those facts in the light most favorable to the plaintiff. *Gustafson*, 117 F.3d at 1017; *Gutierrez*, 111 F.3d at 1369.

Treaty-reserved rights (i.e., rights explicitly reserved to the Indians in a treaty) and aboriginal rights (i.e., rights arising from occupancy and use of land by the Indians from time immemorial) enjoy different levels of legal protection. *See Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39, 65 S.Ct. 690, 89 L.Ed. 985 (1945) (distinguishing aboriginal and treaty-reserved rights); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 919 (8th Cir. 1997), *cert. granted*, ___ U.S. ___, 118 S.Ct. 2295, 141 L.Ed.2d 156, 1998 WL 72988 (U.S. June 8, 1998) (No. 97-1337); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 351-53 (7th Cir. 1983). We thus address the Menominee claims to usufructuary rights arising from the treaties of 1831 and 1854 separately from those claims based on the Tribe's aboriginal rights.

1. Treaty Based Claims

Treaties between the United States and Indian tribes are congressional acts akin to statutes. *See Ward v. Race Horse*, 163 U.S. 504, 511, 16 S.Ct. 1076, 41 L.Ed. 244 (1896) ("A treaty may supersede a prior act of congress, and an act of congress may supersede a prior treaty."); *Reich v. Great Lakes Indian Fish and Wildlife Comm'n*, 4 F.3d 490, 493 (7th Cir. 1993) ("Indian treaties are the legal equivalent of federal statutes."). Treaties are also contracts subject to special rules of contract interpretation. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970) ("[T]reaties are not to be considered as exercises in ordinary conveyancing."). Specifically, "treaties with Indians must be interpreted as they [the Indians] would have understood them, and any doubtful expression in them [the treaties] should be resolved in the Indians' favor." *Choctaw Nation*, 397 U.S. at 631, 90 S.Ct. 1328 (citations omitted); *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) ("[T]reaties should be construed liberally in favor of the Indians.") (citation omitted); *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766, 105 S.Ct. 3420, 87 L.Ed.2d 542 (1985) ("[D]oubts concerning the meaning of a treaty with an Indian tribe should be resolved in favor of the tribe.").

At the same time, the Supreme Court has cautioned that "even though legal ambiguities are resolved to the

benefit of the Indians, courts cannot ignore plain language [contained in a treaty] that . . . clearly runs counter to a tribe's later claims." *Klamath*, 473 U.S. at 774, 105 S.Ct. 3420 (citation omitted). In other words, courts cannot, "under the guise of [liberal] interpretation, . . . rewrite congressional acts [i.e., treaties] so as to make them mean something they obviously were not intended to mean." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179, 67 S.Ct. 650, 91 L.Ed. 823 (1947) (interpreting several treaties between the United States and the Ute Indian tribes). "Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice." *Choctaw Nation v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 87 L.Ed. 877 (1943).

Congress can modify and abrogate treaty-reserved rights, just like federal statutes. *Menominee*, 391 U.S. at 412-13, 88 S.Ct. 1705; *Reich*, 4 F.3d at 493. However, when Congress abrogates treaty-reserved rights the United States must compensate the tribe for the loss of those rights. *Menominee*, 391 U.S. at 413, 88 S.Ct. 1705. Therefore, in the context of treaty-reserved usufructuary rights, courts will not readily imply a congressional intent to repeal such rights. *Id.*; *Reich*, 4 F.3d at 493; *Lac Courte Oreilles*, 700 F.2d at 352 ("[A]brogation of treaty-recognized title requires an explicit statement by Congress or, at least, it must appear clear from the circumstances and legislative history surrounding a Congressional act."). Finally, courts must construe successive treaties in conjunction with the language of earlier treaties. *See, e.g.*, *Klamath*, 473 U.S. at 768, 105 S.Ct. 3420 ("The language of the [later treaty] must be read with these terms of the [earlier treaty] in mind."); *Ute Indians*, 330 U.S. at 176-80,

67 S.Ct. 650 (interpreting treaty in light of language used in two earlier treaties and an earlier executive order).

The Menominee present claims based on usufructuary rights purportedly reserved in both the 1831 Treaty and the 1854 Treaty. We analyze these claims separately based on the foregoing legal principles.

a. Claims based on the 1831 Treaty

The Menominee argue that the 1831 Treaty reserved their right to fish and hunt on lands ceded to the east side of the Fox River and their right to hunt on lands west of the river. The Tribe contends that the subsequent treaties did not expressly abrogate these usufructuary rights and, therefore, the Menominee retain the right to exercise these rights free from state regulation. The district court concluded that the 1848 Treaty extinguished any usufructuary rights the 1831 Treaty reserved. We agree because in the 1848 Treaty the Menominee Tribe ceded all of its rights to all of its Wisconsin land. 1848 Treaty Art. II ("The said Menomonee [sic] tribe of Indians agree to cede, and do hereby cede, sell, and relinquish to the United States all their land in the State of Wisconsin wherever situated.").

The 1848 Treaty forecloses any claim of usufructuary rights reserved in the 1831 Treaty. In the Treaty of 1848, the Menominee Tribe unambiguously ceded all of its Wisconsin land to the United States in exchange for land located in Minnesota, and agreed to move to the new territory within two years unless the President gave the Tribe permission to remain on the ceded land. 1848 Treaty Art. II. Clearly, by the terms of the 1848 Treaty, the

Menominee relinquished title to their Wisconsin land. As the district court noted, the Menominee could not reasonably have expected to continue hunting and fishing on the land ceded in 1848, considering the Tribe had just agreed to leave the Wisconsin land and move to the Minnesota reservation approximately 300 miles away.

The Tribe attempts to avoid this conclusion by arguing that the 1848 Treaty was obtained through fraud and that the tribal signatories believed that the land cession was contingent on the aforementioned Treaty-promised exploratory trip to the Minnesota reservation. However, assuming that in 1848 the tribal signatories did not believe the Treaty was binding, by 1850, when the Tribe requested the President's permission to extend the removal period, the Menominee certainly understood the terms of the 1848 Treaty: if in 1850 the Tribe did not believe that the 1848 Treaty was binding, why did the Tribe seek the president's permission to remain on land in Wisconsin; if the Treaty was non-binding such permission would obviously have been unnecessary.

Moreover, although the Preamble to the 1854 Treaty suggests that the Tribe felt cheated by the 1848 Treaty, the remedy contained in the 1854 Treaty was not a repudiation or rescission of the 1848 Treaty. Rather, the 1854 Treaty unambiguously confirmed the terms of the 1848 Treaty. 1854 Treaty Preamble ¶ 1 (describing Treaty of 1854 as "supplementary" to the Treaty of 1848). By its terms, the 1854 Treaty regarded the Minnesota reservation as belonging to the Menominee and, in order to accommodate the desire of the Menominee to remain in Wisconsin, provided that the Minnesota reservation would be exchanged for a Wisconsin reservation located

on the Wolf River. The 1854 Treaty thereby reinforced the terms of the 1848 Treaty.

The Tribe maintains that its refusal to remove to Minnesota demonstrates its belief that the 1848 Treaty was not binding. The Supreme Court, however, rejected a similar argument in *New York Indians v. United States*, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927 (1898):

> While it might be reasonably contended that their failure to remove should result in a cancellation of the treaty, and a restoration to them of their rights in the Wisconsin lands, that construction is precluded by the language of the [treaty], which contains a present and irrevocable grant of the Wisconsin lands, and puts it beyond their power to revoke the bargain.

Id. at 19, 18 S.Ct. 531 (construing a treaty exchanging Wisconsin land for land in Kansas which the New York tribes never occupied). The 1848 Treaty at issue in this case also contained a present and irrevocable grant of the Wisconsin lands; the Tribe's refusal to move to Minnesota does not affect that grant in any way. *See also Sokaogon Chippewa Community v. Exxon Corp.*, 2 F.3d 219, 222 (7th Cir. 1993) (continued occupancy of ceded lands by Indians is irrelevant to issue of whether Indians retain any occupancy rights in those ceded lands).

The Tribe does not challenge the fairness of the 1854 Treaty. Instead it argues that neither the 1848 Treaty nor the 1854 Treaty explicitly abrogates the usufructuary rights allegedly reserved in the 1831 Treaty. Therefore, it contends that the usufructuary rights reserved in Article Sixth of the 1831 Treaty continue unabated. But the Tribe relinquished all its usufructuary rights in the 1848 Treaty;

thus it is irrelevant that the 1854 treaty did not explicitly abrogate those rights. However, for the sake of completeness, we address the Tribe's other arguments. The usufructuary rights on the east side of the Fox River and those on the west side of the river were reserved subject to different conditions. Therefore, we analyze the Tribe's contentions separately as to each set of rights.

The usufructuary rights on the east side of the Fox River were reserved as follows:

> The Menomonee [sic] tribe of Indians shall be at liberty to hunt and fish on the lands they have now ceded to the United States, on the east side of [the] Fox river [sic] and Green bay [sic], with the same privileges they at present enjoy, until it be surveyed and offered for sale by the President; they conduct themselves peaceably and orderly.

1831 Treaty Art. Sixth ¶ 1. Clearly, the usufructuary rights were conditional. *Compare Ward v. Race Horse*, 163 U.S. 504, 509-10, 16 S.Ct. 1076, 41 L.Ed. 244 (1896) (discussing abrogation of conditional usufructuary rights). The Menominee were free to use the land as long as they "conducted themselves peaceably and orderly," but only until the President had the land surveyed and offered for sale. It is undisputed that the land was surveyed and offered for sale shortly thereafter in 1834. Therefore, according to the terms of the treaty, the usufructuary rights on the east side of the Fox were extinguished long before the Tribe and the United States entered into the 1848 Treaty. Because the right to hunt and fish on these lands was extinguished in 1834 through satisfaction of the conditional term (namely, the land was surveyed and

offered for sale), it was unnecessary to explicitly abrogate the right to use lands east of the Fox in the 1848 Treaty, and even less reason to mention that right in the 1854 Treaty. *See Klamath*, 473 U.S. at 773, 105 S.Ct. 3420 (later treaty's silence as to usufructuary rights is irrelevant when earlier treaties did not reserve such rights); *Mille Lacs*, 124 F.3d at 925 (distinguishing cases in which earlier treaties did not secure off-reservation usufructuary rights and those in which they did when analyzing the effect of a subsequent treaty's silence on the issue).

The Tribe argues that the terms of the 1831 Treaty are ambiguous, and that the treaty could be understood to mean that the Menominee had the right to use whatever part of the lands east of the river that were unsold so long as they behaved "peaceably and orderly." The language in the 1831 Treaty simply does not support such an interpretation: it does not distinguish between land actually sold and land offered for sale. Moreover, the government's express purpose for entering into the 1831 Treaty was to encourage the Menominee to become farmers and to use the land east of the Fox River for settlers. Allowing the Tribe to hunt on the lands that were not actually sold certainly would not have served the government's goals of discouraging the Tribe's pursuit of hunting and gathering food and encouraging settlement. Given this historical context, we will not ignore the plain meaning of the 1831 Treaty. *See Klamath*, 473 U.S. at 774, 105 S.Ct. 3420 ("[C]ourts cannot ignore plain language [in treaties] that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims.").

As to the land west of the Fox River, the 1831 Treaty provided the following:

> [The remaining land] the Menomonees [sic] claim as their country; that part of it adjoining the farming country,[4] on the west side of the Fox river [sic], will remain to them as heretofore, for a hunting ground, until the President of the United States, shall deem it expedient to extinguish their title. In that case, the Menomonee [sic] tribe promise to surrender it immediately, upon being notified of the desire of Government to possess it. The additional annuity then to be paid to the Menomonee [sic] tribe, to be fixed by the President.

1831 Treaty Art. Sixth ¶ 2. Although in general usufructuary rights are not dependant on having title to the land, *see, e.g., Sokaogon Chippewa Community*, 2 F.3d at 223, here the 1831 Treaty explicitly links the right to hunt on the land to having title to the land: the Treaty states that the Tribe's right to hunt on the land remained until the President extinguished their title to the land. The Treaties of 1836 and 1848, in which the Menominee ceded title to those lands, thus extinguished their right to use the land

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[4] The "farming country" refers to a specific part of the reservation which the Indians agree to use for agricultural purposes. In 1831, the Menominee were somewhat nomadic hunter-gatherers; the government wanted to encourage farming among the Menominee, thereby eliminating the necessity to roam over millions of acres, that were claimed by the Tribe, in search of food. *See* 1831 Treaty Art. Fourth ("The following described tract of land . . . shall be set apart, and designated for their future homes upon which improvements as an agricultural people are to be made. . . . The above reservation being made to the Menomonee [sic] Indians for the purpose of weaning them from their wandering habits, by attaching them to comfortable homes.").

for hunting. Again, it was unnecessary to mention the usufructuary rights in the 1854 Treaty.

The Tribe attempts to analogize the 1831 Treaty condition, "until the President . . . shall deem it expedient," to the treaty language at issue in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983), in order to support its assertion of continuing usufructuary rights on the west side of the Fox River. In *Lac Courte Oreilles*, this court analyzed a treaty reserving usufructuary rights "during the pleasure of the President." *Id.* at 345. We held that this language did not give the President unlimited power to revoke the right to use the land. Rather, we opined that the Indians reasonably understood the treaty to mean that they could use the land so long as their coexistence with the white settlers was peaceful. *Id.* at 356-57. In other words, we interpreted the treaty to mean that the President would be pleased as long as the Indians lived peacefully with the settlers, and that the Indians thus had the right to use the land for as long as they remained peaceful.

Our holding in *Lac Courte Oreilles* is not relevant to the question presented here. In *Lac Courte Oreilles*, the determinative issue was how to interpret the phrase "the pleasure of the President." In this case we are not set the task of analyzing the meaning of "until the President of the United States shall deem it expedient." Instead, the question is whether the terms of the treaty inextricably joined the Tribe's usufructuary rights to the Tribe's title to the land, and thus whether those usufructuary rights were extinguished when the Tribe ceded its title to the land. For purposes of this analysis, the Tribe's understanding of "expedient" is irrelevant.

The Menominee also assert that they ceded the land west of the Fox under the assumption that title to the land would revert to their possession if the New York tribes chose not to settle there. But the treaty explicitly states that if the New York tribes did not relocate to Wisconsin, "such portion [of land] as would have belonged to said [New York] Indians shall revert to the United States. That portion, if any, so reverting, to be laid off by the President." 1831 Treaty Art. First. The Tribe's alleged expectation that they would keep the land if the New York tribes did not take it runs counter to the express language of the treaty. We will not interpret a treaty to mean the opposite of what it says. *See Klamath*, 473 U.S. at 774, 105 S.Ct. 3420 ("[C]ourts cannot ignore plain [treaty] language that . . . clearly runs counter to a tribe's later claims."). We disagree and hold that the Tribe's claim on this issue is based on a foundation of legal quicksand.

We conclude that the Tribe can prove no set of facts which would entitle them to exercise usufructuary activities on lands off of the reservation under the 1831 Treaty. Thus, the district court correctly dismissed the Menominee's claims to continuing off-reservation, treaty-reserved usufructuary rights.

b. Claim based on the 1854 Treaty

The Menominee also claim the right to fish for sturgeon off of the reservation because manmade dams are preventing tribal members from exercising their 1854 Treaty right to catch sturgeon on the reservation. Purportedly, the 1854 Treaty reserved 50% of the sturgeon

resource exclusively for the use of the Menominee, and now, because the dam prevents 50% of the sturgeon from reaching the reservation, the Tribe wants equitable relief in the form of a declaration of off-reservation fishing rights. Because the terms of the 1854 Treaty do not expressly entitle the Tribe to a specific proportion of sturgeon, the Menominee are not entitled to relief on this claim. Indeed, Article 2 of the 1854 Treaty, which established the Wolf River Reservation, does not explicitly mention either fishing or sturgeon:

> In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that track of country lying upon the Wolf River, in the State of Wisconsin . . . [describing the boundary of the Wold [sic] River Reservation].

The treaty does not guarantee any amount or quantity of sturgeon to the Tribe and we must interpret a treaty as a contract.

In each of the cases the Tribe cites in support of this claim, the treaty at issue explicitly secured off-reservation fishing rights to the Indians. *See Washington*, 443 U.S. at 661, 99 S.Ct. 3055 (treaty guaranteeing the "right of taking fish . . . in common with all citizens of the Territory."); *Puyallup v. Department of Game of State of Washington*, 433 U.S. 165, 177 n. 16, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977) ("The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory."); *United States v. Winans*, 198 U.S. 371, 378, 25 S.Ct. 662, 49 L.Ed. 1089 (1905) (treaty securing "the right of taking fish at all

usual and accustomed places, in common with citizens of the territory."). Additionally, the treaties at issue in *Washington, Puyallup,* and *Winans* expressly provided that the tribal off-reservation fishing rights would be shared with non-treaty, or non-Indian, fishermen. In other words, the tribes in *Washington, Puyallup* and *Winans* had a "textual handle", or specific treaty language, *see Sokaogon Chippewa Community,* 2 F.3d at 223, supporting their claims to a specific proportion of fish. The Menominee Tribe, on the other hand, has not pointed to any language in the treaties supporting its claim to a specific proportion of the sturgeon catch.

The Tribe attempts to develop such a textual handle by reference to the Supreme Court's *Menominee* decision. 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). The Menominee contend that the Supreme Court, by recognizing the 1854 Treaty's silence on hunting and fishing rights but interpreting the Treaty as reserving such rights, essentially re-wrote the Treaty to explicitly reserve fishing rights to the Tribe. This argument is problematic for several reasons. First, the Supreme Court did not re-write the treaty; rather, the Court interpreted ambiguous treaty language. *Id.* at 405-06, 88 S.Ct. 1705 (interpreting "for a home, to be held as Indian lands are held."). Here, the treaty (contract) is not ambiguous. The language is clear and not subject to the interpretation offered by the Tribe. Moreover, the Supreme Court was not interpreting the 1854 Treaty in the context of allocating usufructuary resources between the Indians and non-Indians. *Compare Washington,* 443 U.S. at 684-85, 99 S.Ct. 3055 ("Both sides [i.e., Indians and non-Indians] have a right, secured by treaty, to take a fair share of the available fish."). A

declaration of on-reservation fishing rights is not equivalent to a right to some proportion of the sturgeon catch. In this case, it is not possible to interpret "as Indian lands are held" as a reservation of a specific proportion of the sturgeon catch as against non-Indian fishers.

Furthermore, the *Menominee* decision involved on-reservation usufructuary rights, while here, the Menominee seek a declaration of off-reservation rights. This distinction differentiates the Tribe's claims from those of other Indians, which rely on treaties securing off-reservation usufructuary rights. For instance, in *Winans*, the Court declared an easement on privately held lands for the Indians to enforce a treaty securing off-reservation fishing rights. 198 U.S. at 382; *see also Washington*, 443 U.S. at 685-86, 99 S.Ct. 3055 (affirming district court's allocation of certain percentage of harvestable portion of fish in order to secure treaty right to take fish in common with others at all usual and accustomed places). As discussed in a prior section of this opinion, the Menominee did not reserve off-reservation usufructuary rights in any of the earlier treaties, and the 1854 Treaty is silent on the issue. We are unaware of any Supreme Court decision authorizing a declaration of off-reservation fishing rights to remedy the inability to exercise a claimed "right" not even mentioned in a treaty. As stated in *Choctaw Nation*, "Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice." 330 U.S. at 179, 67 S.Ct. 650.

The Menominee can prove no set of facts entitling them to a declaration of off-reservation fishing rights based on the 1854 treaty. Therefore, the district court correctly dismissed the Tribe's sturgeon claims.

2. Claims Based on Aboriginal Possession and Use of Lands

The Tribe asserts a continuing right to fish in Lake Winnebago, Lake Michigan, and the Wisconsin River. The Menominee contend that, because they have used the resources of these waters from time immemorial and because none of the treaties expressly extinguished their aboriginal rights or fishing rights in those waters, the Tribe retains its aboriginal right to use those bodies of water free from state regulation. We disagree.

"Extinguishment of Indian title based on aboriginal possession. . . . [can] be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, [and] its justness is not open to inquiry in the courts." *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 347, 62 S.Ct. 248, 86 L.Ed. 260 (1941). Abrogation of aboriginal title occurs "without any legal responsibility in the sovereign [United States] to compensate the Indian for his loss." *Northwestern Bands of Shoshone Indians*, 324 U.S. at 339, 65 S.Ct. 690; *see also Lac Courte Oreilles*, 700 F.2d at 351 (*citing Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288-89, 75 S.Ct. 313, 99 L.Ed. 314 (1955)). Furthermore, the creation and acceptance of an Indian reservation by treaty constitutes a relinquishment of aboriginal rights to lands outside the reservation. *Santa Fe Pacific R.R.*, 314 U.S. at 357-58, 62 S.Ct. 248; *Lac Courte Oreilles*, 700 F.2d at 352. The Tribe signed the 1854 Treaty which created the Wolf River reservation and extinguished any aboriginal rights the Menominee possessed, including aboriginal rights in land or water not specifically mentioned in any treaty. It is irrelevant

whether members of the Tribe continued to use these off-reservation resources. *Santa Fe Pacific R.R.*, 314 U.S. at 357, 62 S.Ct. 248. Because the Menominee can prove no set of facts under which they would be entitled to exercise aboriginal rights, this claim was properly dismissed as well.

III. CONCLUSION

The decision of the district court is AFFIRMED.

HARLINGTON WOOD, JR., Circuit Judge, concurring.

I write separately not out of dissatisfaction with the result reached in the foregoing opinion, but only to express some personal thoughts.

Cases involving Native Americans are not taken lightly, but are given the most conscientious thought and study. The policies enumerated and applied by the Supreme Court and other courts are based on history and fairness. There is understanding of the unique legal status of Native Americans in our society, and full appreciation of all their contributions to life and culture in this modern America.

We do not write today, however, on a blank slate, but one covered with history, the words and circumstances of the treaty entered into as well as other subsequent events mentioned in the opinion. It is no surprise that some Native Americans of this generation are dissatisfied with what their prior generations agreed to in order to resolve their problems of earlier times. Times change and people change, but treaties do not. In certain instances where

there appear to have been misunderstandings resulting from the negotiations between two different cultures, a reasonable remedy can be judicially authorized. The present case, however, is clear as to what both parties sought to accomplish, and did. The Native Americans reaffirmed their intentions and understanding of the treaty by their subsequent acts and litigation.

In our consideration of the past we cannot ignore or abandon what clearly resulted from the mutual efforts of the parties, nor can we renegotiate or rewrite the treaty or history, nor can we erase other relevant factors from the slate in order to satisfy this present generation. Our responsibilities neither permit more nor are we capable of more.

My concern with this appeal has been whether or not the allowance of the motion to dismiss, in contrast with the summary judgment procedure or a trial on the merits, was an appropriate disposition. After an independent examination of the law and the facts I conclude that the case was properly decided by the district judge who gave careful attention to all its aspects. Nothing suggests that there is anything significant which might possibly be added to the full consideration which this case has received.

I, therefore, concur.

MENOMINEE INDIAN TRIBE
OF WISCONSIN, Plaintiff,

v.

Tommy G. THOMPSON, Governor of the State of Wisconsin; George E. Meyer, Secretary, Wisconsin Department of Natural Resources; James T. Addis, Administrator of DNR Division of Resource Management; John E. Fryatt, Administrator of DNR Division of Enforcement; Herbert F. Behnke, Trygbe A. Solberg, Neal W. Schneider, Betty Jo Nelsen, Mary Jane Nelson, James E. Tiefenthaler, Jr. and Stephen D. Willett, Members of the Wisconsin Natural Resource Board, Defendants.

No. 95-C-0030-C.

United States District Court,
W.D. Wisconsin.

Feb. 26, 1996.

Bruce R. Greene, Greene, Myer & McElroy, P.C., Boulder, CO, for Plaintiffs.

Charles D. Hoornstra, Asst. Atty. General, Madison, Wisconsin, for Defendants.

OPINION AND ORDER NO. 2

CRABB, District Judge.

Plaintiff Menominee Indian Tribe of Wisconsin brings this action for declaratory and injunctive relief, asserting that it enjoys off-reservation rights to hunt, fish and gather without state restriction on the lands it ceded to the United States in 1831, 1836 and 1848; that it has unextinguished aboriginal rights, derived from long uninterrupted use, to hunt and fish in various Wisconsin

waters, including Lakes Winnebago and Michigan, the bay of Green Bay and portions of the Wisconsin River; and that it has the right to harvest Wolf River sturgeon in off-reservation, downstream portions of the Wolf River/ Lake Winnebago ecosystem. Defendants have moved to dismiss the case on the grounds of failure to state a claim upon which relief can be granted, judicial estoppel and issue and claim preclusion. Defendants raised lack of subject matter jurisdiction as another ground for dismissal but plaintiff cured the problem by amending its complaint to delete any claim against the state of Wisconsin or the Wisconsin Natural Resources Board, both of which are immune from suit under the Eleventh Amendment.

With respect to counts I through V of the complaint, I conclude that plaintiff has alleged facts sufficient to state a claim, that questions of fact preclude a decision on defendants' motion to dismiss on the ground of judicial estoppel and that plaintiff's suit is not barred by the doctrine of nonmutual issue preclusion. With respect to the last claim relating to the sturgeon harvest, however, I conclude that plaintiff has failed to state a claim upon which it could obtain the relief it is seeking. Courts cannot rewrite treaties in the manner plaintiff has requested, which would permit the tribe to harvest sturgeon outside its reservation free of state regulation as an equitable accommodation for the manmade obstructions that prevent the sturgeon from reaching plaintiff's reservation. As to this count, defendants' motion to dismiss will be granted.

FACTS ALLEGED IN COMPLAINT

Plaintiff Menominee Indian Tribe of Wisconsin is a federally recognized sovereign Indian tribe with a tribal government organized under the Indian Reorganization Act, 25 U.S.C. §§ 461-479, and the Menominee Restoration Act, 25 U.S.C. §§ 903-903f. The tribe is self-governing and has the capacity to regulate the usufructuary (hunting, fishing and gathering) activities of its members. It is suing for itself and its members.

Defendant Tommy G. Thompson is the governor and chief executive officer of the state of Wisconsin. He is named as representative of all legislative, executive, judicial and administrative bodies of the state and of all citizens of the state. Defendants Herbert F. Behnke, Trygbe A. Solberg, Neal W. Schneider, Betty Jo Nelsen, Mary Jane Nelson, James E. Tiefenthaler, Jr. and Stephen D. Willett are members of the Wisconsin Natural Resources Board, charged by state law with the direction and supervision of the Wisconsin Department of Natural Resources, or DNR. These defendants establish the administrative rules and policies through which the department carries out its natural resource management and regulatory programs. Defendant George E. Meyer is Secretary of the Department of Natural Resources and is responsible for the agency's management under state statutes and regulations. He is charged with supervising the department's natural resource management and regulatory programs. Defendant James T. Addis is Administrator of the department's Division of Resource Management and is responsible for planning and coordinating the development, protection and use of Wisconsin's forest, fish and wildlife

resources through agency programs, policies and regulations. Defendant John E. Fryatt is Administrator of the department's Division of Enforcement and is charged with planning and directing a coordinated program of law enforcement encompassing all DNR enforcement activities.

From time immemorial, plaintiff and its members occupied the shores of Lake Winnebago and the shores and islands of Lake Michigan from the mouth of the Escanaba River to the mouth of the Milwaukee River, including all of Green Bay. This occupancy continued until well after the establishment of plaintiff's reservation in 1854. Plaintiff and its members hunted, fished and collected plant foods on Lakes Winnebago and Michigan.

For a number of years, defendants and their agents, employees, representatives and predecessors in office have adopted natural resource regulations and enforced them against members of the plaintiff tribe. Tribal members attempting to exercise their usufructuary rights on lands outside their reservation have suffered confiscation of personal property, the imposition of fines and other money penalties, the imposition of state license fees as a condition for exercising their usufructuary rights and have been subject to threats of such actions. Plaintiff and its members have been deterred and prevented from exercising their usufructuary rights for purposes of subsistence and commerce. As a result, their ability to earn a living from the natural resources outside their reservation has been disrupted and impaired.

The area within which plaintiff claims the right to hunt, fish and gather without state restriction is shown in Map 1 below.

[Map Omitted In Printing]

The area in dispute does not include 1) any of the area plaintiff ceded to the United States for the benefit of the New York Indians in Article First of the Treaty of February 8, 1831, 7 Stat. 342, except for that portion of the ceded lands that is within the boundaries of the Menominee Indian Reservation; 2) any area ceded by the Chippewa Indians in the Treaty of July 29, 1837, 7 Stat. 536, or the Treaty of October 4, 1842, 7 Stat. 591; and 3) any area ceded by the Stockbridge-Munsee Indian Tribe in the Treaty of February 11, 1856, 11 Stat. 679. (Plaintiff reserves for future resolution any issue involving these areas.) Plaintiff's claim to usufructuary rights extends to all waters within the area affected by its claims and those lands within this same area that are publicly or privately owned if they are open to the public for the usufructuary activities at issue.

On February 8, 1831, plaintiff signed the first treaty of significance to this lawsuit. 7 Stat. 342. In addition to ceding certain land to the United States for the benefit of the New York Indians, in Article Third of the 1831 treaty, the tribe ceded a large tract of land located on the east side of the Fox River and Green Bay in the state of Wisconsin, as shown in Map 2 below.

[Map Omitted In Printing]

The boundaries of the cession are expressly meandered along the shorelines of Lakes Winnebago and

Michigan, from the mouth of the Milwaukee River to the mouth of the Fox River. The ceded area includes all of the Door Peninsula but does not include the waters of either Lakes Michigan or Winnebago.

Article Sixth of the 1831 Treaty provided that

> The Menomonee [sic] Tribe of Indians shall be at liberty to hunt and fish on the lands they have now ceded to the United States, on the east side of the Fox river and Green bay, with the same privileges they at present enjoy, until it be surveyed and offered for sale by the President; they conducting themselves peaceably and orderly.

The second paragraph of the same treaty described by metes and bounds the boundaries of the tribe's lands on the west side of the Fox River. The second paragraph of Article Sixth provided that

> the boundary, as stated and defined in this agreement, of the Menomonee country, with the exception of the cessions herein before made to the United States, the Menomonee claim as their country; that part of it adjoining the farming country, on the west side of Fox river, will remain to them as heretofore, for a hunting ground, until the President of the United States, shall deem it expedient to extinguish their title. In that case, the Menomonee tribe promise to surrender it immediately, upon being notified of the desire of [the] Government to possess it.

In treaties executed on September 3, 1836, 7 Stat. 506, and October 18, 1848, 9 Stat. 952, plaintiff ceded additional lands in Wisconsin. In Article First of the Treaty of 1836, plaintiff ceded to the United States land on the northwestern shore of Lake Winnebago and on the shore

of Lake Michigan from the mouth of the Fox River to the mouth of the Escanaba River, as shown in Map 2 above. In the same article, plaintiff ceded to the United States an area along the Wisconsin River, three miles in width on either side and described as follows:

> Beginning at a point upon said Wisconsin river two miles above the grant or privilege heretofore granted by said nation and the United States, to Amable Grignon; thence running up and along said river forty-eight miles in a direct line: and being three miles in width on each side of said river; this tract to contain eight townships or one hundred and eighty four thousand three hundred acres of land.

On May 12, 1854, plaintiff signed the Treaty of Wolf River with the United States that established the Menominee Reservation in Wisconsin. 10 Stat. 1064. *See* Map 2 above. This treaty established the Menominee Reservation as "a permanent home . . . to be held as Indian lands are held," for plaintiff's exclusive use and perpetual enjoyment. At the time of the treaty, the harvest of sturgeon from the reservation waters of the Wolf River was an important and integral part of plaintiff's subsistence and figured prominently in plaintiff's cultural and religious practices. The Treaty of 1854 reserved the sturgeon resource of the reservation for the exclusive use of the tribe. Around the turn of the century, obstructions in the form of dams were constructed on the Wolf River downstream of the reservation, preventing the sturgeon from returning to the reservation waters of the river. Although sturgeon still inhabit the Wolf River, Fox River and Lake Winnebago ecosystem, they can migrate

upstream only so far as the Shawano Paper Mill dam, a few miles downstream from the reservation.

ADDITIONAL TREATY PROVISIONS

In addition to the facts alleged in plaintiff's complaint, certain facts drawn from the treaties at issue are relevant to a determination of defendants' motion. These are summarized below.

In the 1831 treaty, plaintiff set out the area of land it claimed as its own, as shown in Map 3 below. [Editor's Note: Map 3 appears on page 194]

[Map Omitted In Printing]

> On the *east* side of Green bay, Fox river, and Winnebago lake; beginning at the south end of Winnebago lake; thence southeastwardly to the Milwauky or Manwauky river; thence down said river to its mouth at lake Michigan; thence north, along the shore of lake Michigan, to the mouth of Green bay; thence up Green bay, Fox river, and Winnebago lake, to the place of beginning. And on the *west* side of Fox river as follows: beginning at the mouth of Fox river, thence down the east shore of Green bay, and across its mouth so as to include all the islands of the "Grand Traverse;" thence westerly, on the highlands between the lake Superior and Green bay, to the upper forks of the Menomonee river; thence to the Plover portage of the Wisconsin river; thence up the Wisconsin river, to the Soft Maple river; thence to the source of the Soft Maple river; thence west to the Plume river, which falls into the Chippeway river; thence down said Plume river . . .

In return for the approximately three million acres plaintiff ceded to the United States in the 1831 treaty (including about 500,000 acres for the use of the New York Indians), it received, among other things, lump sum cash payments, annuities for thirteen years and the promise of the United States to employ persons to teach farming and housewifery, to erect houses for the tribe, to supply implements for farming and husbandry, to support schools, to erect and support a gun and blacksmith shop, to build a saw and grist mill, to employ a miller and to instruct interested young men in the miller's trade.

In the 1836 treaty, the tribe agreed to "cede and relinquish to the United States" more than four million acres in northeastern Wisconsin (as shown in Map 2 above) and to "remove from the country ceded, within one year after ratification of this treaty" and to relieve the United States of certain promises made in the 1831 treaty, such as the payment of farmers, blacksmiths and millers, the appropriations for education, the improvements promised for the reservation and the cattle, and the provision of farming utensils and other miscellaneous tools, utensils and other articles. In return, the tribe received annuities for twenty years and payment of its debts to certain named persons (presumably traders), as well as $3000 worth of unspecified provisions, two thousand pounds of tobacco, thirty barrels of salt and the appointment and payment of two blacksmiths.

Twelve years later, plaintiff entered into the Treaty of 1848, under which it agreed to "cede, and do hereby cede, sell, and relinquish to the United States all [its] lands in the State of Wisconsin wherever situated." 9 Stat. 952. In

return, the United States agreed to "give and do hereby give, to said Indians for a home, to be held as Indians lands are held," a tract of land in west-central Minnesota, consisting of 600,000 acres. The government agreed to pay the tribe $350,000, $200,000 of which was to be paid in annuities to the tribe when the annuities promised in previous treaties had expired. The remainder was to be used for the costs of removal, resettlement and subsistence during the first year following removal; the operation of a grist mill, blacksmith shop and manual labor school; the cost of an investigatory trip to the new lands by a delegation of the tribe; and the tribe's expenses in arranging to move and to resettle on the new lands. The treaty provided that the tribe would be permitted to stay in Wisconsin on the ceded lands for two more years "until the President shall notify them that the same are wanted."

The tribe's delegation traveled to Minnesota and found the new lands unsuitable. Its "manifestation of great unwillingness . . . to remove to the country west of the Mississippi river, upon Crow Wing, which had been assigned them, and a desire to remain in the State of Wisconsin," Treaty of 1854, Preamble, 10 Stat. 1064, led to negotiations with the United States for the Treaty of Wolf River of May 12, 1854, that was explicitly "supplementary and amendatory to the [1848 treaty]." *Id.* The tribe agreed to "cede, sell and relinquish to the United States" all the Minnesota lands assigned to it under the 1848 treaty in exchange for the Wisconsin lands along the Wolf and Oconto rivers in east-central Wisconsin that became its reservation, "to be held as Indians lands are held." *Id.* In addition to the grant of the reservation lands, the 1854

treaty retained the removal and subsistence payment guarantees provided in the 1848 treaty.

FACTS SUBJECT TO JUDICIAL NOTICE

I take judicial notice of the following public records and documents filed in public offices. *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1086 (2d Cir. 1982) (even on motion to dismiss, judicial notice may be taken of incontrovertible facts from materials whose authenticity is not in question).

According to the Annual Report of the Commissioner of Indian Affairs for 1851, in 1850, R.W. Thompson, a lawyer representing plaintiff, wrote to the United States Secretary of the Interior, advising him of plaintiff's position that it had conveyed more land under the treaty of 1848 than the federal government had acknowledged. Thompson asked that a new treaty be made because the old one was the product of fraud and violence employed by the federal government against the Menominee and a new treaty was the "only legal mode of redressing the wrongs and grievances of which they complain." Annual Report of the Commissioner of Indian Affairs for 1851, Appendix to Brief of Wisconsin Paper Council at 62.

In proceedings before the Indian Claims Commission in 1951, plaintiff asserted that in the treaty it signed in 1848, it had "relinquished and ceded . . . all its right, title and interest in and to all its remaining lands in Wisconsin." Menominee Petition to Indian Claims Commission, June 26, 1951, ¶ 7(i), Defs.' App. at 260. On July 10, 1951, plaintiff recovered $8,500,000 in separate proceedings

before the United States Court of Claims through a settlement. Defs.' App. at 239-40. Paragraph 3 of the stipulation with the United States provided:

> 3. In consideration of . . . $8,500,000 . . . the plaintiff Tribe hereby releases all other claims, whether legal, equitable or moral and whether or not specifically mentioned or referred to herein, which the said Tribe may have against the United States up to the present time, including land claims arising under the Treaties of [1831, 1836, 1848, and 1854].

Defs.' App. at 242. The July 13, 1951 order of dismissal by the Court of Claims provided that the parties had "compromised and settled their differences" in settlement of both those Court of Claims cases "and other liabilities." Defs.' App. at 243. On December 10, 1951, a joint stipulation and motion to dismiss the Indian Claims Commission matter was submitted by the parties with the statement that "this was a result of a compromise of Menominee litigation." Defs.' App. at 264-65. The Indian Claims Commission matter was dismissed "with prejudice" on April 24, 1952. Defs.' App. at 276.

A memorandum report filed with the Court of Claims recited that the settlement related to claims asserted in seven different proceedings before the court, covering such matters as lost interest on trust funds and improper taking of timber. Defs.' App. at 247-50. The memorandum makes no reference to land claims.

OPINION

A. *Plaintiff's Claims*

In the first count of its complaint, plaintiff contends that it retains treaty-reserved usufructuary rights in the territory it ceded under Article Sixth of the Treaty of 1831 on the east side of the Fox River and Green Bay, including "all waters within the area." In count II, plaintiff contends that under the second paragraph of Article Sixth, it retains treaty-reserved usufructuary rights in that part of Menominee country "adjoining the farming country, on the west side of the Fox river" and all waters within the area. In count III, plaintiff contends that it has aboriginal usufructuary rights in the waters of Lake Michigan and Winnebago and in and along a portion of the Wisconsin River and that these rights derive from its occupancy of the adjacent land and the use of the lakes. Plaintiff contends also that when it ceded the land on the eastern shore of Lake Winnebago and along part of the shore of Lake Michigan in the Treaty of 1831 and the land on the northwestern shore of Lake Winnebago and the remainder of the shoreline of Lake Michigan in the Treaty of 1836, the boundaries of its cession were meandered expressly along the shoreline and did not include any of the waters of either lake. Accordingly, plaintiff contends, it did not relinquish any of its aboriginal rights in the two lakes.

In count IV, plaintiff contends that the federal government recognized plaintiff's usufructuary rights in the Wisconsin waters of Green Bay in paragraph second of Article Sixth of the Treaty of 1831 and that neither the Treaty of 1831 nor the Treaty of 1836 extinguished these

treaty-reserved rights. In count V, plaintiff contends that it retains aboriginal usufructuary rights to a specific portion of the Wisconsin River recognized by the government in Article First of the Treaty of 1836 and that the treaty does not contain any release or relinquishment of the tribe's usufructuary rights in the ceded area. In count VI, plaintiff contends that it has a treaty-based right to fish downstream of the obstructions on the Wolf River in order to enjoy its 1854 reservation rights that have been violated by the obstruction of the upstream migration of sturgeon.

B. *Posture of Case*

In the majority of cases involving interpretation of treaties, courts have decided the treaties' meaning either after trial or on a well developed record prepared in connection with a motion for summary judgment. *See, e.g., Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F.Supp. 784, 840 (D.Minn. 1994) (canons of construction for Indian treaties require "careful examination of the historical record to determine the intent of the parties"), *appeal dismissed in part and briefing ordered in part*, 48 F.3d 373 (8th Cir. 1995); *United States v. Bouchard*, 464 F.Supp. 1316, 1357 (W.D.Wis. 1978) (Indians' understanding of treaty determined on cross-motions for summary judgment), *rev'd on other grounds sub nom. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir. 1983). Defendants contend, however, that there is no prohibition against deciding a treaty case on a motion to dismiss when the only issues are ones of law or when the plaintiffs have failed to allege facts sufficient to

state a claim and they cite *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339, 344, 62 S.Ct. 248, 250, 86 L.Ed. 260 (1941) (grant of motion to dismiss affirmed for government's failure to state a claim on which equitable relief could be granted) and *Sokaogon Chippewa Community v. Wisconsin*, 879 F.2d 300, 301-03 (7th Cir. 1989) (affirming grant of motion to dismiss on ground that statute of limitations had run on tribe's suit against United States). *See also Choctaw Nation v. United States*, 318 U.S. 423, 430-33, 63 S.Ct. 672, 677-78, 87 L.Ed. 877 (1943) (reversing Court of Claims, which had taken evidence of parties' understanding of treaty, and holding that findings were inadequate to justify departure from unambiguous language of agreement); *United States v. Choctaw & Chickasaw Nations*, 179 U.S. 494, 532-542, 552, 21 S.Ct. 149, 164-68, 171, 45 L.Ed. 291 (1900) (same).

I agree with defendants that this case can be treated like any other, giving due regard to the canons of construction that govern Indian treaty interpretation. If defendants can show that plaintiff has failed to allege facts sufficient to state a claim on which relief can be granted or that plaintiff is barred as a matter of law from prosecuting the case, they are entitled to prevail on their motion to dismiss.

C. *Treaty-Reserved Usufructuary Rights – Counts I and II*

Plaintiff rests its interpretation of the treaties on two arguments. The first is that the construction of the treaties cannot be determined on a motion to dismiss because the court cannot know without taking evidence how the Menominee understood the language and import of those

treaties at the time they were signed. Thus, although the 1831 treaty appears to contain specific temporal limits on the tribe's right to hunt and fish on its lands (on the lands it was ceding on the east side of the Fox River and Green Bay *until those lands were surveyed and offered for sale by the President* and on the lands it was retaining on the west side of the Fox *until the President of the United States should deem it expedient to extinguish the tribe's title*), the court cannot assume that the Menominee understood their hunting and fishing rights to be limited in duration. To the contrary, plaintiff asserts in its brief, its leaders understood that the treaty allowed the tribe to hunt, fish and gather on the lands and waters in both the ceded and unceded territory so long as these activities did not conflict with the settlers on the land. Plaintiff does not explain the historical basis for the tribe's understanding or attempt to tie its interpretation to any particular treaty provision or extrinsic event. However, plaintiff maintains it should have an opportunity to adduce evidence on such matters as the tribe's cultural circumstances, its leaders' ability to understand what they were agreeing to, their intent in signing the treaties and their subsequent actions to the extent they are reflective of the tribe's understanding of the treaties.

Plaintiff's second argument is that once the federal government reserved usufructuary rights in the ceded lands to the tribe, as it did in the 1831 treaty, it could not extinguish those rights except by explicit provision in a treaty or by other congressional action that evidenced an intent to abrogate these rights. In a variant of this argument, to be taken up in Part D, *infra*, plaintiff asserts that the government could abrogate aboriginal usufructuary

rights only in the same manner that it extinguished treaty-reserved usufructuary rights, that is, by explicit provision in a treaty or by congressional action. According to plaintiff, none of the treaties the tribe executed after 1831 contained any explicit reference to the extinguishment of its usufructuary rights, either treaty-retained or aboriginal; plaintiff ceded title and occupancy rights in the treaties but did not give up its separate and distinct usufructuary rights. Therefore, it argues, the tribe's members may continue to exercise those rights, free of any restrictions imposed by the state of Wisconsin.

In response to plaintiff's arguments, defendants maintain that plaintiff's treaty-reserved rights were unambiguously temporary and the conditions for extinguishment have been met; the 1836 treaty extinguished the 1831 temporary rights west of the Fox River because it ceded title to those lands and required removal from them; statehood extinguished any and all temporary rights throughout Wisconsin; the 1848 removal treaty extinguished any and all other interests plaintiff had in all Wisconsin lands wherever situated; the United States Supreme Court has ruled that the tribe has lost all its off-reservation usufructuary rights; and plaintiff is judicially estopped from denying extinguishment of its treaty rights because it has taken a prior inconsistent position in formal legal proceedings and is now bound by that position.

1. *Factual sufficiency of plaintiff's allegations*

It is a close question whether plaintiff's allegations in support of counts I and II are sufficient to state a claim. Plaintiff's assertion of the tribe's understanding of the

duration of its usufructuary rights is not fleshed out with supporting detail. It has not explained why its members thought the usufructuary rights would continue indefinitely in the face of language that provided that the activities would last only until the lands were offered for sale or until title was extinguished. Plaintiff does not suggest that the tribe understood the phrase, "they conducting themselves peaceably and orderly" to mean that its usufructuary rights (on the east side of the Fox River at least) might continue indefinitely. The tribe does not describe any statements made to its leaders during negotiations that might have led them to such an understanding or cite any specific language in the treaty that might have conveyed such an understanding to the tribe. Plaintiff refers to "hundreds, perhaps thousands, of documents which surround the treaty transactions," and adds that "[i]t is from these documents as explained by persons steeped in the history of the age and the culture and world view of the Tribe that the Indians' understanding may be gathered." Pl.'s Brief, dkt # 25, at 25. Presumably, plaintiff is familiar with these documents and the opinions of the experts and has grounds for its claims. It would have been helpful had plaintiff revealed these grounds to the court and to defendants.

In its brief in opposition to defendants' motion to dismiss, plaintiff has added some factual allegations to flesh out the spare allegations of its complaint. Plaintiff says that it is necessary to assume that at the time the treaties were signed, the Menominee met their subsistence needs through a mixed agrarian, hunting and gathering economy that focused on the rivers, lakes and upland marshes in the area; that the tribe took a variety

of fish species from the rivers and lakes, hunted and trapped inland and collected food plants, including wild rice; that its primary territory was the area along the shore of Green Bay and around Lake Winnebago; that identifiable bands of the Menominee lived on the Wolf, Menominee, Peshtigo, Fox and other smaller rivers, and on Lake Winnebago and Green Bay; and that in entering into treaties with the United States, the Menominee sought to protect a constellation of resources upon which the tribe relied for its subsistence, cultural integrity, political autonomy and land tenure.

Defendants do not dispute the importance of the land to plaintiff or plaintiff's desire to obtain the most beneficial result for its members in each of the treaty negotiations. However, the question is not what plaintiff wanted or needed when it entered into negotiations with the United States; it is what plaintiff actually agreed to in its treaty negotiations. On that question, plaintiff is noticeably reticent. Nevertheless, I believe it would be improper to dismiss all of plaintiff's claims at this stage of the litigation.

It is well known that Indian treaties must be interpreted as the Indians understood them, that doubtful expressions are to be resolved in favor of the Indians and that treaties must be construed liberally in favor of the signatory tribes. These venerable canons of construction reflect the unequal bargaining positions of the parties that entered into the treaties. The United States was represented by persons "skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves."

Jones v. Meehan, 175 U.S. 1, 11, 20 S.Ct. 1, 5, 44 L.Ed. 49 (1889). The "Indians, on the other hand, [were] a weak and dependent people, who [had] no written language and [were] wholly unfamiliar with the forms of legal expression. . . . " *Id.* Accordingly, treaties are not to be construed by "the technical meaning of [their] words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Id.*

Determining the Indians' understanding may require expert testimony to explain the historical and cultural context in which the Indians viewed the treaty provisions. *See, e.g., McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 174, 93 S.Ct. 1257, 1263, 36 L.Ed.2d 129 (1973) (treaties are not to be read as ordinary contracts agreed upon by parties with equal bargaining positions); *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930) ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."); *Winters v. United States*, 207 U.S. 564, 576-77, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908) ("ambiguities occurring [in treaties] will be resolved from the standpoint of the Indians").

It is true that "[t]he canon of construction regarding the resolution of ambiguities . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506, 106 S.Ct. 2039, 2044, 90 L.Ed.2d 490 (1986). *See also Amoco Production Co. v. Gambell*, 480 U.S. 531, 555, 107 S.Ct. 1396, 1409, 94 L.Ed.2d 542 (1987) (*citing Catawba Indian Tribe*); *Choctaw Nation*, 318 U.S. at 432, 63 S.Ct. at 678 ("even

Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties"). As I have noted, plaintiff has not identified any provision of the treaties it believes to be ambiguous. It may well be that it will be unable to do so even after the record has been developed. However, the treaties are not models of clarity or good draftsmanship. I cannot say with certainty that plaintiff will not be able to demonstrate that the treaties could have been understood reasonably by plaintiff's leaders to mean something other than what they seem to say.

The three major cases involving treaty rights of Indians of the upper Midwest teach the important lesson that ambiguities in treaties are often subtle and not obvious to modern readers. *See, e.g., Mille Lacs Band of Chippewa Indians,* 861 F.Supp. 784; *Lac Courte Oreilles,* 700 F.2d 341, *United States v. Michigan,* 471 F.Supp. 192 (W.D.Mich. 1979); *aff'd in relevant part,* 653 F.2d 277 (6th Cir.), *cert. denied,* 454 U.S. 1124, 102 S.Ct. 971, 71 L.Ed.2d 110 (1981). In both the *Mille Lacs* and *Lac Courte Oreilles* litigation, the courts determined that the Chippewa retained usufructuary rights under a provision in an 1837 treaty that provided that the Chippewa signatory bands could continue to enjoy usufructuary rights on the land they ceded to the United States "during the pleasure of the President of the United States," a term the courts found to be ambiguous. It could mean an "at will" kind of occupancy in which the President was free to order the Chippewa out of the territory at any time for any reason or it could mean he was free to do so only if the Chippewa misbehaved and incurred his displeasure. The Lac

Courte Oreilles produced contemporary reports that supported their contention that when the tribes had signed treaties in 1837 and 1842, they understood that "the pleasure of the President" meant their right to hunt, fish and gather would continue undisturbed unless they misbehaved. *Lac Courte Oreilles*, 700 F.2d at 356; *Bouchard*, 464 F.Supp. at 1348-49.

The Lac Courte Oreilles and other Chippewa bands entered into another treaty in 1842 under which they could continue to exercise their usufructuary rights "until required to remove by the President of the United States." In 1850, President Zachary Taylor issued an executive order requiring the tribes' removal. All of the courts that have considered the matter have concluded that the President issued the order without any evidence that the Chippewa had misbehaved. The order was illegal: neither authorized by the treaties nor within the scope of the President's power. *Mille Lacs*, 861 F.Supp. at 826; *Lac Courte Oreilles*, 700 F.2d at 362; *Bouchard*, 464 F.Supp. at 1350. The Court of Appeals for the Seventh Circuit concluded that without a lawful order of removal, and without any showing that the treaty negotiated in 1854 extinguished the tribes' usufructuary rights, the state of Wisconsin had failed to show that the Wisconsin Chippewa had lost their right to hunt, fish and gather in the ceded territory. *Lac Courte Oreilles*, 700 F.2d at 364-65. The district court in Minnesota reached the same conclusion with respect to the Mille Lacs band after finding that an 1855 treaty signed did not explicitly extinguish the tribe's usufructuary rights.

In *United States v. Michigan*, 471 F.Supp. 192, the district court found that certain Michigan Ottawa and

Chippewa tribes' right to fish in the Great Lakes had not been extinguished by white settlement, despite language in a treaty signed in 1836 setting a temporal limit on the Indians' right of hunting on the ceded lands and other privileges of occupancy "until the land is required for settlement." The district court held that this language would not have been understood by the Indians as restricting their right to fish in the Great Lakes "because these large bodies of water could not possibly be settled by homes, barns and tilled fields." *Id.* at 253. In the court's view, the Indians might have understood that they were giving up their right to hunt as the land became settled but they would not have understood that their right to fish would be lost; the "western movement of non-Indian settlers could be accommodated without requiring the Indians to relinquish their aboriginal and treaty rights to fish." *Id.*

Although it does not follow ineluctably from the fact that the treaties with the Chippewa were ambiguous that the treaties the Menominee signed were ambiguous, the sophistication of the analyses in the cited cases sounds a cautionary note against deciding the meaning of the Menominee treaties without a more complete record. Of course, it is not enough for plaintiff simply to assert that because the Michigan Chippewa would have thought the Great Lakes unnecessary for "settlement," the Menominee would have had the same understanding about the far smaller lakes and rivers in their territory. Plaintiff will have to adduce facts to show why the Menominee would have had such an understanding under the very different circumstances of their tribal culture, their location and the terms of the treaties they executed. However,

I cannot say at this stage of the litigation that plaintiff cannot make this showing.

Defendants are concerned, and rightly so, about the expense of lengthy and wide-ranging discovery they may have to conduct if this case is not dismissed at this time. I suspect that the discovery can be narrowed by a prompt determination of the facts upon which plaintiff will rely to support its assertion that its leaders would have reasonably understood the 1831 treaty to mean they had an indefinite usufructuary privilege on the ceded and unceded land described in the treaty. Submission of contention interrogatories to plaintiff should be sufficient to learn the factual basis for its claims. Certainly, plaintiff would not have brought this suit had it lacked a reasonable factual basis for its claims, knowing of the requirements Fed.R.Civ.P. 11 imposes upon parties litigating in federal court. More to the point, a premature dismissal of plaintiff's action would only increase the parties' ultimate expenditure of time and money. It is a better use of the parties' and court's resources to defer decision until a proper record has been developed.

Plaintiff points to the Menominee's continued fishing and hunting in Wisconsin as an indication of its members' belief that the tribe retained permanent usufructuary rights under the various treaties. Plaintiff alleges, and defendants do not dispute, that the tribe continued to travel and use resources in Wisconsin following the signing of the 1848 treaty and after the establishment of the Menominee reservation in 1854. Although in and of itself such activity is not sufficient to show the understanding of the tribe in signing the various treaties, it could lend support to other evidence showing that the tribe believed

it had retained its usufructuary rights. *See Lac Courte Oreilles*, 700 F.2d at 364 (that Chippewa tribes continued to hunt and fish on ceded territory long after their reservations were created is evidence of Indians' understanding of treaty). *Cf. Sokaogon Chippewa Community v. Exxon Corporation*, 805 F.Supp. 680, 689-90, 698-700, 703 (E.D.Wis. 1992) ("whatever rights the [Sokaogon Chippewa] kept after the ratification of the 1854 treaty, they maintained approximately the same nomadic lifestyle they had previously," but such activity did not give them any right of occupancy in the land), *aff'd* 2 F.3d 219, 222 (7th Cir. 1993) (Sokaogon could not rely on their use of off-reservation lands to establish right to occupy those lands when government had never acknowledged tribe's right to remain where members were living). *See also Bouchard*, 464 F.Supp. at 1359 (hunting and fishing on public and undeveloped land was part of frontier way of life for Indians and white people alike; thus, Indians' practice of roaming on non-reservation lands is not persuasive evidence they were exercising special treaty rights); *Healing v. Jones*, 210 F.Supp. 125, 147-48, 174 (D.Ariz. 1962) (failure to use force to eject Indians from area does not constitute implied agreement to allow Indian settlement; "Actual use and occupancy of land, without more, has no connotation of rightful possession. A trespasser may have actual use and occupancy of land."), *aff'd*, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963). However, it is too early in the litigation to assess the nature and weight of the evidence of continued use that plaintiff will introduce to support its claims. This is another reason why dismissal of the case would be premature without a fully developed record.

2. *Legal status of use rights*

Plaintiff's second argument is based entirely on legal grounds. It relates to the separability of use and occupancy rights and the endurance of use rights. Much of what plaintiff says is indisputable: if a tribe has a treaty-reserved usufructuary right of indefinite duration, that right can continue to exist even if the tribe cedes its right of occupancy in the same land on which the use right runs. *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905); *Lac Courte Oreilles*, 700 F.2d 341. Such a right can be terminated or abrogated only by explicit language in a later treaty or by congressional action evidencing governmental intent to end the right. *Id.* at 356 (citing *Menominee Tribe v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968) (articulating for first time requirement that treaty-protected use rights require explicit language for extinguishment).

If plaintiff can establish that its leaders would have understood reasonably from the provisions of the 1831 treaty that the Menominee's usufructuary rights would last indefinitely so long as their activities did not conflict with the settlers, then it would follow that the tribe retains those rights unless defendants can show either that the rights were terminated expressly by a later treaty or that Congress intended and achieved their abrogation. On the other hand, unless plaintiff can prove that the plain language of the treaty does not control the duration of the rights, the question of explicit extinguishment of the usufructuary rights does not arise. It would be unnecessary for the government to provide expressly for the extinguishment of rights that were to expire of their own

accord. The rights would be extinguished by the occurrence of the terminating events, as provided.

Plaintiff does not agree with the proposition that recognized use rights may terminate of their own accord under specific provisions of the treaty in which they were recognized. It contends that once the government recognizes a usufructuary right, that right is "severed" from the rights of title and occupancy and can be terminated only by explicit extinguishment in a subsequent treaty or by other congressional action, even if the right recognized by the government is expressly intended to be of a limited duration. As I understand plaintiff's argument, it is that it is not sufficient to provide that a tribe will retain rights until the occurrence of a particular event such as surveying and offering for sale; rather, the government must provide explicitly that the rights will continue until the occurrence of the particular event *at which time the hunting and fishing rights will be extinguished.* Moreover, plaintiff argues, defendants seem to be unaware that rights of use and occupancy are separable and that the whole idea of usufructuary rights is that they do not depend upon occupancy rights or title to the underlying land. *See* Pl.'s Brief, dkt. # 25, at 3 ("[A] critical defect in the State defendants' argument relates to their failure to understand and accept that use rights are separate and distinct from occupancy rights and title to land.")

Plaintiff has cited no support for its contention that any recognition of a use right severs it from rights of title and occupancy and requires explicit language for extinguishment. It is inconsistent with the law, which recognizes that extinguishment of use rights can occur in accordance with treaty provisions. *See* Felix S. Cohen,

Handbook of Federal Indian Law 468 (1982) ("Indian hunting and fishing rights can be terminated in the same way as other treaty rights. They can be extinguished by the terms of the treaty itself, by Act of Congress, or by a subsequent inconsistent treaty.") (citing *Ward v. Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896) (treaty right to hunt on unoccupied lands of United States so long as peace exists between whites and Indians expired when United States conveyed lands to state of Wyoming)).

3. *Effect of 1848 treaty*

Defendants contend that even if plaintiff could show that its usufructuary rights did not expire by their own terms, the tribe would have to show that the 1848 treaty did not extinguish those rights, which is something plaintiff cannot do. Defendants characterize the 1848 treaty as an "obligatory removal" treaty unlike the permissive removal treaties entered into by the Chippewa tribes and one that took effect immediately upon signing, thereby making it an "in praesenti" treaty, that is, one taking effect immediately. Defendants maintain that the sweeping language of the 1848 treaty would have been understood by the Menominee as a relinquishment of all rights, including those of hunting and fishing. Moreover, even if the tribe did not understand from the words of the treaty that it was relinquishing its usufructuary rights, it would have understood that this would follow from the treaty's requirement that the tribe leave the area it had occupied for centuries and move hundreds of miles west to an area beyond the Mississippi. In response, plaintiff asserts that the 1848 treaty was null and void because it was the product of fraud and coercion, that it never took effect

because the tribe never moved to the new reservation lands and that it was nullified by the 1854 treaty that allowed the tribe to remain in Wisconsin. In addition, plaintiff maintains that the significance of the treaty cannot be determined without exploring the tribe's understanding of it.

Enough questions persist about how the tribe perceived its obligations and cessions under the 1848 treaty to make it improper to hold as a matter of law that plaintiff could never show that the tribe understood the treaty as something far different from what it appears to be, that is, an in praesenti treaty of obligatory removal that by its nature would have had the effect of extinguishing all rights possessed by the tribe, including those of hunting and fishing. For example, the provisions giving the tribe an opportunity to make an exploratory trip to the new reservation and the right to remain in Wisconsin for two more years or "until the President shall notify [the tribe] that the [lands in Wisconsin] are wanted" raise questions about the alleged obligatory nature of the treaty. I cannot say whether the Menominee would have understood it as terminating their occupancy rights on the land, let alone their usufructuary rights. However, I agree with defendants that plaintiff cannot prevail on its assertions that the 1848 treaty can be ignored because it is the product of fraud and coercion or because it was nullified by the 1854 treaty. The first of these assertions is wrong as a matter of law; the inaccuracy of the second can be determined by reading the language of the 1854 treaty, the plain meaning of which has not been challenged by plaintiff.

It is well settled law that courts may not look behind a treaty to evaluate its legitimacy. Even if a treaty is the product of bribery, fraud or duress or executed by representatives of minority factions of the signatory tribes, it is considered the law of the land, subject to the same respect as any law passed by Congress and any treaty signed with a foreign nation. *See* Cohen, *supra*, at 63 (citing *United States v. New York Indians*, 173 U.S. 464, 469-70, 19 S.Ct. 487, 489-90, 43 L.Ed. 769 (1899); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366, 372, 15 L.Ed. 684 (1857)). *See also Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68, 23 S.Ct. 216, 222, 47 L.Ed. 299 (1903) (Court could not consider contentions that 1892 treaty with Kiowa and Comanche was obtained by fraudulent misrepresentations and concealment, that requisite number of male Indians had not signed and that treaty had been amended by Congress without submitting such amendments to the Indians because these matters were "solely within the domain of the legislative authority and its action is conclusive upon the courts"); *Choctaw & Chickasaw Nations*, 179 U.S. at 535-36, 21 S.Ct. at 165 (if treaty of 1866 did injustice to Choctaws and Chickasaws, remedy is not with courts, but with political department of government). Whatever improper or even illegal acts induced the Menominee to sign the 1848 treaty, the treaty cannot be ignored when determining the Menominee's understanding of the rights they did or did not retain.

Plaintiff's suggestion that the 1854 treaty "nullified" the 1848 treaty is not borne out by anything in the language of the later treaty, in which plaintiff ceded all of the Minnesota territory granted it in 1848 in return for the twelve townships of land on the Wolf and Oconto Rivers

that were to constitute its reservation. The 1854 treaty says explicitly that it is intended to be amendatory and supplementary to the 1848 treaty. Moreover, it retains many of the guarantees given in 1848, carries over payments that were to have been made under the earlier treaty and makes no reference to rescinding the earlier cession of land. In fact, the treaty provides additional compensation to plaintiff for the lands ceded in the 1848 treaty (presumably in response to R.W. Thompson's 1850 entreaty to the Commissioner of Indian Affairs on behalf of the Menominee).

Both the Supreme Court of Wisconsin and the United States Supreme Court have read the 1854 treaty as making an entirely new grant of rights to plaintiff, rather than as rescinding the 1848 treaty and restoring plaintiff to its prior position and previous rights. *See State v. Sanapaw*, 21 Wis.2d 377, 382, 124 N.W.2d, 41, 43 (1963) ("1848 treaty ceded all lands in Wisconsin to the United States, and the 1854 treaty did not abrogate this cession, but made an entirely new cession"); *Menominee Tribe*, 391 U.S. at 405, 88 S.Ct. at 1707 ("By [1854] treaty the Menominees retroceded certain lands they had acquired under an earlier treaty and the United States confirmed to them the Wolf River Reservation."). Plaintiff may be able to prove that the 1848 treaty did not have the effect defendants say it had, but the tribe cannot show that it was nullified by the 1854 treaty.

4. *Acceptance of payments, annuities and supplies*

In return for signing the 1848 treaty ceding all remaining land in Wisconsin to the federal government

and agreeing to remove to western Minnesota, the Menominee were to receive 600,000 acres of land in western Minnesota and various cash payments of more than $350,000. Defendants suggest that such payments are evidence that the tribe knew it was giving up all its usufructuary rights. Why else, they ask, would the government have made such payments if not to reimburse plaintiff for the loss of its usufructuary rights and to provide alternative means of subsistence? *Cf. Sokaogon Chippewa Community*, 2 F.3d at 225 (acceptance of annual payments provided under treaty of 1842 implies that Sokaogon Chippewa accepted burdens of treaty as well as its benefits and that they surrendered their right of occupancy). The answer to this question is not as obvious as defendants suggest. The offer and acceptance of such payments are ambiguous, at least on the present record. Given that the government expected (and certainly implied to the tribe) that the new Minnesota lands would provide hunting and fishing opportunities, it is not evident that the payments were intended to make up for the loss of usufructuary rights in Wisconsin. It is just as likely that the payments were made to cover the costs of moving to a new location and establishing a new community. It is even more likely that the payments were intended to encourage the tribes to develop agricultural interests to replace their nomadic hunting and fishing existence. Defendants' argument is not a sufficient reason to dismiss plaintiff's first and second claims.

5. *Effect of statehood*

Defendants contend that Wisconsin's admission to statehood in 1848 had the effect of extinguishing all of the

Menominee's temporary, title-dependent rights, including the usufructuary rights at issue. Citing *Ward v. Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, defendants argue that permanent treaty-reserved rights outlast admission to the Union, but temporary rights do not; if it were otherwise, no state would enter into the Union on an "equal footing" with the other states. In *Race Horse*, the question was whether the state of Wyoming could prosecute a member of the Bannock tribe for killing elk off the reservation in violation of the state's game laws. The Court concluded that the state could prosecute, despite the language of the treaty entered into with the Bannocks under which a reservation was set aside for the tribe and the members were guaranteed "the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon." *Id.* at 505, 16 S.Ct. at 1076. To reach a different conclusion, said the court, would mean that Wyoming would be unable to regulate the killing of game within its borders and to that extent, would have been admitted to the Union, "not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence." *Id.* at 514, 16 S.Ct. at 1080.

As plaintiff points out, the *Race Horse* decision has been criticized frequently and has been limited in its scope by subsequent decisions. *See, e.g., United States v. Winans*, 198 U.S. at 382-84, 25 S.Ct. at 664-65 (sustaining off-reservation treaty fishing rights against "equal footing" arguments). *See also* Cohen, *supra*, at 469-70. *But see Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995) (although 1868 treaty reserved right to tribes "to hunt on

the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts," court found that tribe's hunting rights did not survive Montana's admission to statehood, relying on decision in *Race Horse* that addressed identical treaty language).

Defendants acknowledge the criticism of *Race Horse*, but maintain that the holding continues to apply to rights that are only temporary. This argument begs the question. It is the nature and scope of the rights that are in dispute. If, in fact, the rights granted plaintiff in the 1831 treaty are temporary in nature, as defendants contend, then the rights expired on their own terms and the equal footing doctrine has no relevance. If, as plaintiff contends, the rights are permanent, then the equal footing doctrine does not affect them. *See generally* Cohen, *supra*, at 268 n. 73: "Indian rights depend on determination of the scope of federal treaties and laws, and the Equal Footing Doctrine is irrelevant to that determination." Whether the rights reserved by plaintiffs were temporary or permanent and whether the *Race Horse* opinion has any relevance are issues whose resolution must await further development of the factual record.

6. *Interrelationship of all treaties*

Defendants argue that the interrelationship of the treaties reveals a pattern that undermines plaintiff's claims to a continuing usufructuary right. It is true that the treaties reveal the United States' pursuit of the goal of securing all of the tribe's land in Wisconsin for the use of

white settlers. Thus, in the 1831 treaty, the government laid out the boundaries of the tribe's land claim and secured a cession of hundreds of thousands of acres of land in northeastern Wisconsin, while reserving to plaintiff a temporary right to continue to hunt and fish in the ceded territory. In the 1836 treaty, the government secured a second cession of land on the west side of the Fox River, reserving nothing for the tribe, and in 1848, the government secured a cession of the remaining land in Wisconsin that plaintiff occupied, reserving nothing for the tribe and requiring its complete removal to west-central Minnesota. Each treaty built upon its predecessor by continuing forward the obligations undertaken in the previous agreements. The signing of a new treaty did not discharge the parties from their obligations unless specific provision was made for doing so.

Having established that a pattern existed, however, defendants have not shown that plaintiff cannot prove that it retained usufructuary rights in its land in Wisconsin. This depends on the proof that plaintiff can adduce of its members' understanding of the treaties, primarily those signed in 1831 and 1848.

D. *Usufructuary Rights in Waters of Wisconsin*

1. *Count III – aboriginal rights to hunt and fish in Wisconsin waters*

Aboriginal title derives from a native people's occupancy of a specified area continuously from a time preceding the arrival of white settlers. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279, 75 S.Ct. 313, 317, 99 L.Ed.

314 (1955). *Aboriginal usufructuary claims* to hunt, fish and gather "are founded on immemorial custom and practice." Cohen, *supra*, at 442. As the law developed in the United States, native tribes were held to have the right of occupancy of land but title resided in the occupying Europeans. Felix S. Cohen, *Original Indian Title*, 32 Minn.L.Rev. 28, 48 (1947) (citing *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823)). This means that as occupying sovereign, the United States may grant third parties title to Indian land but only after terminating the possessory title of the Indians. *Id.* The federal government grants and protects aboriginal rights "against intrusion by third parties," *Tee-Hit-Ton Indians*, 348 U.S. at 279, 75 S.Ct. at 317, and it alone has the power to extinguish aboriginal title by treaty, agreement, or other authorized action of Congress or the Indians. Cohen, 32 Minn.L.Rev. at 53. "[E]xtinguishment [of aboriginal title] cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *United States v. Santa Fe Pacific Railroad*, 314 U.S. at 354, 62 S.Ct. at 255. In *Santa Fe*, the Court held that the Walapai were not divested of their title when a series of congressional and executive actions treated their lands as publicly owned by mistake but that President Arthur's subsequent order creating a reservation at the request of the Walapai Indians and its acceptance by them "amounted to a relinquishment of any tribal claims to lands based on aboriginal occupancy." *Id.* at 357-58, 62 S.Ct. at 257.

In support of its claim in count III of the complaint that it has unextinguished aboriginal rights to hunt and fish within the waters of Lake Michigan, Green Bay, Lake

Winnebago and part of the Wisconsin River, plaintiff makes the following arguments. Before any white settlers came to Wisconsin and long before any treaties were signed, the tribe occupied the shorelines and used the resources of these waters. This occupancy and use gave the tribe both aboriginal title and separate aboriginal use rights. Although many courts have held that the sovereign can abrogate aboriginal rights at any time and by any means, the situation is different in those parts of the country to which the Northwest Ordinance of 1789 applies. When this ordinance was adopted, it incorporated the promise of the United States government to observe the utmost good faith in its dealings with the Indians and never to take their lands or property from them without their consent. These provisions gave special protection to aboriginal rights, making them subject to extinguishment only by explicit provision. None of the treaties with the Menominee includes any provision extinguishing the tribe's aboriginal use rights explicitly and, with respect to Lakes Winnebago and Michigan, plaintiff never ceded the waters included within the meandered boundaries that were excepted from the cessions plaintiff made in the 1831 and 1836 treaties. (In those treaties, the parties described the area of cession with boundaries that were meandered expressly along the shores of the lakes, so that none of the waters of the lakes themselves were included.)

It is not necessary to decide the merits of plaintiff's argument that special rules apply to the abrogation of aboriginal rights in states covered by the Northwest Ordinance. (In any event, it is difficult to see its relevance; all of the land at issue was secured by the United States by

purchase and not by force.) Plaintiff's basic claim to aboriginal use rights rests on the same factual grounds as its claims to treaty-reserved rights identified in the preceding discussion of counts I and II. Plaintiff must show that it would not have been reasonable for its members to have understood the language of the 1831 treaty as setting a temporal limit on the exercise of the tribe's usufructuary rights and to have understood the purpose and effect of the 1848 treaty as relinquishing their usufructuary rights in Wisconsin.

Plaintiff has another argument relating to usufructuary rights in Lakes Michigan and Winnebago. It maintains that its cession of the land surrounding these lakes in the 1831 and 1836 treaties did not amount to an express relinquishment of its rights to hunt and fish in those lakes because it never ceded the lakes themselves. According to plaintiff, the cessions in both treaties excluded the area within the meandering boundaries of the lakes. Thus, even if the 1831 and 1836 treaties are interpreted according to their plain meaning, they would not operate to extinguish plaintiff's aboriginal usufructuary rights in the lakes.

This argument is logically inconsistent. The 1831 treaty had more than cession as its object: another purpose was to define the metes and bounds of the lands plaintiff claimed as its own in the state of Wisconsin so as to establish the tribe's land boundaries in an effort to prevent encroachment by other tribes. The description of the land claimed by plaintiff used the same "meandering boundaries" of Lakes Michigan and Winnebago that the parties used in the 1831 and 1836 treaties to describe the boundaries of the cessions. Plaintiff does not explain the

apparent inconsistency in arguing that it retains a claim to certain property because it did not include the property within the boundaries of a cession when the same reading of the boundaries would mean that plaintiff never identified the property in the 1831 treaty as being its own.

Assuming that the argument could survive its inherent illogic, it would rise or fall on the plaintiff's understanding of the 1831 and 1848 treaties. In addition, plaintiff would have to show why its cessions in the 1831 and 1836 treaties of the islands in the Fox River, in Green Bay and in Lake Winnebago are not evidence of an intent to convey its aboriginal rights in and to the waters. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918) (grant *to* tribe of "body of lands known as Annette Islands" included adjacent fishing grounds).

2. *Count IV – treaty-reserved aboriginal rights in waters of Green Bay*

As grounds for its claim in count IV, plaintiff argues that the 1831 treaty recognized the tribe's reserved usufructuary right to hunt and fish in Green Bay. Defendants concede that this is correct. The 1831 treaty's reservation of the tribe's right to hunt and fish in the territory east of the Fox River would have included the waters of Green Bay. Defendants contend, however, that plaintiff's right to fish and hunt ended with the terminating event specified in the treaty: the surveying of the land and offering it for sale. Plaintiff repeats the argument it made with respect to its treaty-reserved usufructuary rights in part

C, *supra:* the federal government never extinguished these rights explicitly as required under *Menominee Tribe,* 391 U.S. at 412-13, 88 S.Ct. at 1710-11, and *Lac Courte Oreilles,* 700 F.2d 341. Therefore, plaintiff asserts, the Menominee retain usufructuary rights in the waters of Green Bay. Resolution of this argument will have to await resolution of the basic question: whether plaintiff is bound by the plain meaning of the 1831 treaty or whether it can show that its understanding was different.

Plaintiff makes an additional argument. Citing *United States v. Michigan,* 471 F.Supp. 192, and *People v. LeBlanc,* 399 Mich. 31, 248 N.W.2d 199 (1976), plaintiff argues that insofar as limitations in treaties purport to relate to lands, they do not apply to waters. In other words, plaintiff contends that even if it agreed that its usufructuary rights in the land would come to an end when the land was surveyed and offered for settlement, such a concession would not affect its rights in the lakes because the water was not needed for settlement. In the two Michigan cases, both the state and federal courts agreed that the Chippewa and Ottawa tribes had not relinquished their aboriginal rights to catch fish in the Great Lakes when they ceded vast amounts of land to the United States in 1836. The federal district court found that the United States had not negotiated for the Indians' right to fish off-reservation in the ceded areas. *Michigan,* 471 F.Supp. at 278-79. The court relied on the language in the treaty that provided for the reservation of the Chippewa's usufructuary rights "until the land is required for settlement," agreeing with the state supreme court that this language would not have been understood by the Chippewa to refer to the waters of the Great Lakes because "the ceded

water areas of the Great Lakes have obviously not been required for settlement, and therefore the fishing rights reserved by the Chippewa in those areas have not been terminated." *Id.* at 259 (citing *People v. LeBlanc*, 399 Mich. at 48, 248 N.W.2d at 207).

Although these Michigan cases do not support a general proposition that limitations in treaties that appear to relate to lands can never apply to waters, they suggest that a more complete record must be developed before it will be possible to determine exactly what the Menominee understood when they executed treaties with the government. Whether the smaller lakes and rivers in the Menominee's ceded territory would have been required for settlement and whether the Menominee understood that they retained usufructuary rights in these waters are factual issues to be determined on a more extensive record.

3. *Count V – aboriginal rights to portions of the Wisconsin River*

In count V, plaintiff contends that when it ceded a strip of land along the Wisconsin River, 48 miles long and three miles wide on each side of the river, it retained its aboriginal right to use the river; this aboriginal right was recognized implicitly by the federal government by its acceptance of the cession and has never been extinguished. At this stage of the litigation I cannot say that plaintiff could not succeed on this claim. I note, however, that although plaintiff does not dispute that this area was used traditionally by the Chippewa for hunting and fishing, it does not explain why it can assert a claim of

aboriginal use rights. Ordinarily, aboriginal title requires a showing of exclusive use. Plaintiff cites *Strong v. United States*, 518 F.2d 556, 561, 207 Ct.Cl. 254 (1975), *cert. denied*, 423 U.S. 1015, 96 S.Ct. 448, 46 L.Ed.2d 386 (1975), for the proposition that in rare situations, a showing of "joint and amicable" possession of the same land can overcome the usual rule. The standard for joint and amicable possession seems to be a high one: the Court of Claims says that the relationship of Indian groups that would qualify for treatment under "joint and amicable" occupancy must be "extremely close," such as that in *Sac & Fox Tribe v. United States*, 383 F.2d 991, 179 Ct.Cl. 8 (1967), where the Fox and Sac were deemed to have such a close relationship as to constitute a merger of the previously existing tribal entities. *Strong*, 518 F.2d at 562. To prevail on this claim that it has an aboriginal usufructuary right in the area along the Wisconsin River, plaintiff will have to make the threshold showing that it had joint and amicable possession of this land with the Chippewa.

E. *Judicial Estoppel.*

Plaintiff bases five of its six claims in this suit on the contention that it never lost either its reserved usufructuary rights in the lands it ceded to the United States or its aboriginal hunting and fishing rights in certain Wisconsin waters. Defendant contends that the tribe has taken a contrary position in other proceedings, bringing into play the doctrine of judicial estoppel, which prevents parties from repudiating positions on which they prevailed in previous proceedings. *Continental Illinois Corp. v. Commissioner of Internal Revenue*, 998 F.2d 513, 518 (7th Cir. 1993). The idea is that a party can argue inconsistent positions

in the alternative, "but once it has sold one to the court it cannot turn around and repudiate it in order to have a second victory." *Id. See also, Davis v. Wakelee,* 156 U.S. 680, 689, 15 S.Ct. 555, 558, 39 L.Ed. 578 (1895) (after party has succeeded on one claim in a legal proceeding, he cannot assume a contrary position simply because his interests may have changed). The applicatio.. of the doctrine does not require the entry of a judicial opinion adopting the litigant's position; a settlement favorable to the litigant can suffice. *Kale v. Obuchowski,* 985 F.2d 360, 361-62 (7th Cir. 1993). The doctrine is equitable in nature and should not be applied when the former position was the result of inadvertence or mistake or where there is only an appearance of inconsistency between the two positions. *Matter of Cassidy,* 892 F.2d 637, 642 (7th Cir. 1990).

Plaintiff has filed a number of suits for compensation for the lands it ceded in the nineteenth century and the associated rights it ceded or lost. It brought suit in 1938 before the Court of Claims for the recovery of money for the federal government's conveyance of portions of reservation land to the state of Wisconsin under the Swamp Lands Act of 1850, 43 U.S.C. § 981-994. *Menominee Tribe of Indians v. United States,* 95 Ct.Cl. 232, 1941 WL 4504 (1941). Plaintiff sought the acquisition costs of swamp lands located within the borders of its reservation and the value of the timber removed from such lands. The suit was brought pursuant to a special Act of Congress, 49 Stat. 1085, as amended, 52 Stat. 208, that conferred jurisdiction upon the Court of Claims to determine all legal or equitable claims plaintiff might have against the United States growing out of treaties, agreements, laws of Congress or wrongful handling of the land, timber or other

property of plaintiff. Included in the claims that could be brought was a claim for damages for swamp lands that should have been conveyed to the Menominee by the treaty of 1854, but were not because of a previous conveyance to the state of Wisconsin, pursuant to the 1850 Swamp Lands Act. *Id.* Under that act, the federal government had conveyed to the states in praesenti grants of swamp lands located within their borders, even if the location of the swamp lands had not been determined. *Id.* In 1854, when the United States granted plaintiff its reservation, it did not advise plaintiff that the swamp lands were not included in the grant because they had been conveyed earlier to the new state of Wisconsin. *Id.* In holding that the tribe was entitled to recover from the United States the acquisition costs of the lands, the Court of Claims found that

> [t]he basis, the background, the previous history, and the negotiations leading up to the [1854] treaty show that the Indians were desirous of securing hunting lands and that the swamp lands were particularly suited for this purpose, being filled with all kinds of game.
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> * * *
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> . . . [A] part of the inducement for the moving of the Indians from their former home to their new home, and one of the reasons for entering into the new [1854] treaty was the fact that the tract in question contains swamp lands which were suitable for hunting.

95 Ct.Cl. at 240-41. In a subsequent order, the court entered judgment for plaintiff in the sum of $1,781,282.91, of which $13,666.80 represented the value of the timber

removed from the reservation and the remainder represented the acquisition cost to the tribe of swamp lands located within the boundaries of the reservation. *Menominee Tribe of Indians v. United States,* 101 Ct.Cl. 863 (1944).

On June 26, 1951, plaintiff filed a petition before the Indian Claims Commission, which had been created in 1946, 25 U.S.C. §§ 70, 70v-3 (repealed 1978, 25 U.S.C. § 70v (1983)), to provide a forum for Indian claims against the United States. The commission was intended to replace the cumbersome process under which the Menominee had sued in 1938, which required them to petition Congress for special legislation authorizing suit against the United States. In large part, the impetus for the commission was Congress's desire to find a means of providing moral redress for past wrongs done to the Indians and a legal settling of obligations. David H. Getches et al., *Federal Indian Law* 311 (3d ed. 1993).

In its 1951 petition to the Indian Claims Commission, plaintiff asserted that in treaties signed in 1831, 1836, 1848 and 1854, it had given up to the United States *"all its right, title and interest in and to"* the tracts of land it ceded in each treaty, that it had done so for inadequate and unconscionable consideration and that it was entitled under the law to just compensation for the lands so relinquished. Menominee Petition at 2, 5, 7 and 9, Defs.' App. at 257, 258, 259, 260. On July 10, 1951, approximately two weeks after it filed its petition with the Indian Claims Commission, plaintiff entered into a stipulation settling all of its claims with the United States, "including land claims arising under the Treaties of February 8, 1831, September 3, 1836, October 18, 1848 and May 12, 1854,"

for $8,500,000. Stipulation, Defs.' App. at 241-42. A memorandum report to the Court of Claims indicates that the claims asserted by plaintiff and included in the settlement related to claims asserted in seven different proceedings before the court, covering such matters as the federal government's failure to handle trust funds properly or pay interest on certain funds. It says nothing about any land claims. Defs.' App. at 247-50.

In 1965, plaintiff sued the United States in the Court of Claims again, *see Menominee Tribe v. United States*, 391 U.S. 404, 88 S.Ct. 1705, seeking compensation for the reserved hunting and fishing rights it had lost when it sought and obtained termination of its reservation status under the Menominee Indian Termination Act of 1954 and the Supreme Court of Wisconsin had ruled that passage of the act extinguished the tribe's hunting and fishing rights on its old reservation. *Sanapaw*, 21 Wis.2d 377, 124 N.W.2d 41. Believing that the loss of its guaranteed hunting and fishing rights was compensable, the tribe brought suit in the Court of Claims, which denied plaintiff's claim because it found that passage of the act had *not* extinguished the tribe's usufructuary rights. *Menominee Tribe v. United States*, 388 F.2d 998, 179 Ct.Cl. 496 (1967). In the Court of Claims' analysis, the Wisconsin supreme court had erred in reading the provision in the Termination Act that "the laws of the [state] shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction," 25 U.S.C. § 899, as giving Wisconsin the authority to regulate the Menominee's hunting and fishing within their old reservation. *Menominee Tribe*, 388 F.2d at 1004. This reading would conflict with the language in the

Menominee amendment to Public Law 280, 18 U.S.C. § 1162, which was passed seven years before the Termination Act and provided explicitly for the protection of tribal rights and immunities with respect to hunting and fishing. *Id.* Furthermore, according to the Court of Claims, it was unnecessary to say anything in the Termination Act about the preservation of exclusive hunting and fishing rights because the act called for the tribe to submit a plan for the protection of fish and wildlife. There would have been no reason for such a plan if Congress had intended the state to be responsible for Menominee hunting and fishing. *Id.* at 1006.

Faced with the inconsistent holdings of the Supreme Court of Wisconsin and the Court of Claims, the United States Supreme Court granted certiorari and affirmed the ruling of the Court of Claims on slightly different grounds. *Menominee Tribe,* 391 U.S. 404, 88 S.Ct. 1705. The Supreme Court agreed with the Court of Claims that the Menominee had been guaranteed hunting and fishing rights on its reservation under the 1854 treaty. With that finding, it followed that the tribe would be eligible for compensation for the value of those rights if the Termination Act had abrogated them. However, the act had not had that effect because Congress would not have subjected the United States to a claim for compensation by destroying treaty-conferred property rights without making its intention explicit in the legislation. "We decline to construe the Termination Act as a back-handed way of abrogating the hunting and fishing rights of these Indians." *Id.* at 412, 88 S.Ct. at 1710.

In the 1965 case before the Court of Claims, plaintiff represented that it had obtained the on-reservation rights

under the 1854 treaty as a replacement for the special hunting and fishing rights it had exercised on the lands it ceded to the United States in the 1848 treaty. In a memorandum in support of its claim for compensation for the lost on-reservation rights or in the alternative for a declaration that it had retained its exclusive on-reservation hunting and fishing rights, plaintiff's counsel cited the state supreme court's observation in *Sanapaw*, 21 Wis.2d at 383, 124 N.W.2d at 44, that it was "unlikely that the Menominee would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend." Menominee Memorandum at 17, Defs.' App. at 194. In addition, counsel cited at two different places the language from the opinion of the Court of Claims in the earlier Swamp Lands case, *Menominee Tribe*, 95 Ct.Cl. 232, to the effect that the tribe was desirous of securing hunting lands, that it viewed the swamp lands as particularly suited for this purpose and that the inclusion of the swamp lands in the reservation was an inducement for moving to the reservation. Menominee Memorandum at 6, 18, Defs.' App. at 183, 195.

In an effort to avoid the effect of the doctrine of judicial estoppel, plaintiff argues that none of its litigation before the Court of Claims or the Indian Claims Commission had anything to do with the injunctive and declaratory relief it is seeking in this case and therefore, it had no reason to raise the issue of its reserved usufructuary rights in those proceedings. This argument misses the mark. The question is not whether the same issue is in dispute but whether the party to be estopped took a

position directly contrary to the one it now asserts, under circumstances in which it necessarily repudiated the present position by its assertion of the prior one, *and* whether it prevailed on that position.

I am not persuaded that plaintiff can be judicially estopped from bringing the present litigation because of its assertion in the 1965 litigation before the Court of Claims and later before the Supreme Court that it had lost all right, title and interest in the ceded lands. A fair reading of the opinions of both courts shows that plaintiff did not succeed in "selling" that position to either court. Both courts based their decisions on other grounds. The Supreme Court expressly disavowed any interest in determining the exact nature of the rights conveyed to the tribe. However, my view is different with respect to the 1951 proceeding before the Indian Claims Commission in which plaintiff represented that it had lost "all its right, title and interest in and to" the ceded lands. That position appears to be directly contrary to its position in this suit, which is that it did not lose *all* right and interest but retained usufructuary rights on those lands. The prior position does not appear to be the consequence of inadvertence, lack of understanding or naivete in legal affairs. Plaintiff was represented by counsel throughout all those proceedings. Moreover, the assertions and the circumstances in which the statements are made are of such a nature that a person making one assertion would have to know he was repudiating the other.

Plaintiff states in its brief that the main work of the Indian Claims Commission was resolving claims arising out of disputes over land. Apparently, this statement, together with plaintiff's citation to *Mille Lacs Band of*

Chippewa Indians v. Minnesota, 853 F.Supp. 1118 (D.Minn.1994), are intended as an assertion that the commission would have viewed its petition and its briefs before the commission as limited to claims arising out of land it ceded and land that should have been conveyed to it and not as involving any claims relating to the loss of usufructuary rights. The assertion is unpersuasive in light of plaintiff's concession that the commission's jurisdiction was not limited to land claims. Furthermore, plaintiff's statement in its petition referred to "all right, title and interest in and to" its lands in Wisconsin. Such broad language has been held to encompass fishing and hunting rights when used in a treaty, *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766, 105 S.Ct. 3420, 3428, 87 L.Ed.2d 542 (1985), and it is the logical reading of the petition drafted by counsel for plaintiff.

Plaintiff describes the *Mille Lacs* case as "strikingly similar" to its own as it relates to defendants' contention that plaintiff's proceedings before the Indian Claims Commission bar it from asserting its retained usufructuary rights in this case. Like this case, *Mille Lacs* involved reserved usufructuary rights. The state of Minnesota argued that the band could not prosecute its claim in federal court because it was barred by prior proceedings before the Indian Claims Commission and the Court of Claims. According to the state, further litigation was barred for two reasons: 1) the principle of claim preclusion, which bars relitigation of matters previously litigated; and 2) the Indian Claims Commission Act, which was intended by Congress to provide an exclusive remedy in the Indian Claims Commission. The state contended that once the time for bringing claims before the

commission had elapsed, Indian tribes were foreclosed from suing on claims arising out of treaties with the federal government.

The district court was not persuaded that principles of issue and claim preclusion should apply. First, the question of off-reservation usufructuary rights had not been raised in the prior proceedings and was not necessary to their outcome. *Mille Lacs,* 853 F.Supp. at 1137. Second, as to the state's argument about the exclusive forum offered by the Indian Claims Commission, the court concluded that plaintiff was not required to have raised its claim to the continued existence of its usufructuary rights in the commission because the commission's jurisdiction was limited to providing damages for extinguished title, whereas the tribe's federal court claim was for damages from *present* violations of its off-reservation rights. In the court's view, plaintiff's claim would not have accrued until long after the commission had gone out of existence.

It does not appear that the question of judicial estoppel was raised in the *Mille Lacs Band* case. Therefore, I cannot say that the case supports plaintiff's position and I cannot infer from the case what plaintiff's argument is in opposition to defendants' assertion of the doctrine of judicial estoppel. In the next section, I take up the issue of claim preclusion that the *Mille Lacs* opinion does discuss.

The final question is whether Indian tribes are exempt from the application of equitable doctrines such as judicial estoppel. In *Oneida v. Oneida Indian Nation,* 470 U.S. 226, 244 and n. 16, 105 S.Ct. 1245, 1256-57 and n. 16, 84 L.Ed.2d 169 (1985), the Supreme Court suggested that

the equitable doctrine of laches would not extinguish Indian title. The Court found that the issue had been waived and was not properly before it, but it quoted *Ewert v. Bluejacket*, 259 U.S. 129, 138, 42 S.Ct. 442, 444, 66 L.Ed. 858 (1922), to the effect that the equitable doctrine of laches "cannot possibly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions." In addition, the Court noted that such an extinguishment "requires a sovereign act." *Id.*

Despite the broad language the Court used in the *Oneida* case, it is doubtful that the Court would apply the same reasoning to the equitable defense of judicial estoppel as it is raised in this case. Unlike laches, which is intended "to protect good faith transactions against those who have slept on their rights," *Oneida*, 470 U.S. at 244 n. 16, 105 S.Ct. at 1256-57 n. 16, the doctrine of judicial estoppel works to bar subsequent law suits by persons who have acted purposefully and have knowingly asserted a particular position. Far from sleeping on its rights, plaintiff asserted them actively, intentionally and knowingly. Plaintiff initiated all of the proceedings at issue and did so with the assistance of counsel. Finally, unlike the County of Oneida, which raised the defense of laches in the *Oneida* case in an effort to show that the tribe's rights had been extinguished, defendants do not raise the doctrine of judicial estoppel for that purpose. Rather, they raise it as evidence both that plaintiff has known all along that it did not retain the rights it now asserts and that it has been compensated for the rights it bargained away.

Although defendants have made a strong case for applying the doctrine of judicial estoppel to bar the litigation of plaintiff's claims involving its retained usufructuary rights, there remain factual questions regarding the interplay of plaintiff's 1951 petition to the Indian Claims Commission and the subsequent stipulated Court of Claims settlement. It is not clear from the present record whether the settlement included the claims raised in the petition or was limited to the miscellaneous claims that were pending before the Court of Claims when the petition was filed. The 1951 Court of Claims order stated that plaintiff and the United States had compromised and settled their differences with respect to seven Court of Claims cases and "other liabilities," but did not say explicitly that the settlement award was intended to compensate the Menominee for the claim they had filed with the Indian Claims Commission. Defts.' App. at 243-245. Nevertheless, in April 1952, plaintiff moved to dismiss its case before the Indian Claims Commission with prejudice. Earlier, in a December 10, 1951 letter, the Attorney General had advised the chief clerk of the Indian Claims Commission that the United States and the Menominee had executed a stipulation and joint motion to dismiss the pending claims commission proceedings. Defts.' App. at 264. It appears that this reference is to the settlement of the Menominee litigation in the Court of Claims, but I cannot say that with certainty from the record now before the court.

The upshot of all of this is that if defendants can show that the Court of Claims settlement incorporated the Indian Claims Commission proceeding, it would follow that plaintiff prevailed on the position it took before

the commission, which was that it had lost all right, title and interest in and to the lands it had ceded by treaty. In that case, plaintiff would be prevented by the operation of the doctrine of judicial estoppel from asserting in this court the contrary position that it still retained rights and interests in the ceded lands.

Plaintiff suggests that the language it used in the petition to the Indian Claims Commission should not be read as an assertion that it had lost its treaty-reserved and aboriginal usufructuary rights because it was merely quoting the language in the treaty. It is questionable whether that would make any difference, *see Oregon Dept. of Fish and Wildlife*, 473 U.S. at 768, 105 S.Ct. at 3429 (normal construction of language in 1901 agreement surrendering "all [tribe's] claim, right, title and interest in and to" portion of reservation would encompass any special right to use ceded lands for hunting and fishing in absence of any language reserving any specific rights in lands), but plaintiff is wrong about the language. The treaties do not use the phrase, "right title and interest." In the 1848 treaty, the Menominee ceded and relinquished "all their lands." The treaty contains no reference to "right, title and interest." This language originated with plaintiff's counsel and appears to have been used to persuade the Indian Claims Commission of the scope and extent of the tribe's loss.

At this point, however, I will deny defendants' motion to dismiss counts I-V on the ground of judicial estoppel because I am not prepared to make the necessary factual findings without further development of the record.

H. *Issue Preclusion*

In asserting that plaintiff's claims are barred by the doctrine of issue preclusion, defendants are no longer focusing on the positions plaintiff has taken in prior litigation but on the ruling made by the United States Supreme Court in *Menominee Tribe*, 391 U.S. 404, 88 S.Ct. 1705. Defendants contend that the Court held explicitly that the Menominee received on-reservation rights to hunt and fish in a quid pro quo exchange for their loss of all their off-reservation rights and because this finding was essential to the Court's decision, plaintiff is barred from contending that it did not lose all its off-reservation rights. Plaintiff argues that the only "finding" the Court made was to adopt the conclusion of the Supreme Court of Wisconsin that the rights the Menominee exercised on their reservation were the same as those that Indians in general would exercise on lands never ceded to the government.

"Claim preclusion" bars multiple suits against the same parties on the same claims. It protects against repetitive suits and operates to bar further litigation of all issues relevant to the same claim between the same parties, whether raised at trial or not. 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4402 at 7 (1981) (quoting *Kaspar Wire Works, Inc. v. Leco Engineering & Machinery, Inc.*, 575 F.2d 530, 535-36 (5th Cir. 1978)). (Defendants made a reference to claim preclusion in their brief but they are not basing their argument on it.) "Issue preclusion" bars relitigation between the same parties of issues actually adjudicated and essential to the judgment in a prior litigation. *Id.* Defendants rely on "nonmutual issue preclusion," which

is a special aspect of preclusion that bars a party who has had one fair trial on an issue from going to trial on the merits of that issue a second time, even against a different defendant. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 324, 91 S.Ct. 1434, 1440, 28 L.Ed.2d 788 (1971). *See also* Wright, *supra*, § 4464 at 571. Nonmutual issue preclusion is warranted by the public policy of limiting litigation. *Id.* To invoke nonmutual issue preclusion, the party asserting it must show that its opponent is the same party that first went to trial on the issue, the issue is the same, the issue was resolved by a final judgment on the merits and the party against whom it is invoked had a full and fair opportunity to litigate the issue in the first action. *Id.* Only the third of these requirements is in dispute here: whether the issue was resolved in the prior suit.

The parties agree that in order to determine whether the Menominee retained exclusive hunting and fishing rights on their reservation free from the state's game laws, both the state supreme court and the United States Supreme Court had to make a preliminary determination whether the tribe was granted hunting and fishing rights free from state regulation on its new reservation when it was created in 1854. The treaty itself made no specific reference to any such rights but simply ceded the lands to the Menominee "to be held as Indian lands are held." The Wisconsin supreme court found this phrase ambiguous. *Sanapaw*, 21 Wis.2d at 382, 124 N.W.2d at 44. "One possible interpretation" of the phrase would be "that the Menominee would enjoy the same rights with respect to lands owned and occupied by them which have never been ceded by treaty" and that these rights would include the

right to hunt free from state game laws. *Id.* The court found this to be the logical meaning of the phrase, following the rule of construction that ambiguous phrases are to be interpreted in favor of the Indians and because "[i]t would seem unlikely that the Menominees would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend." *Id.* at 383, 124 N.W.2d at 44. The state supreme court concluded, however, that the Termination Act of 1954 had put an end to the tribe's exclusive hunting and fishing rights.

In resolving the conflict between the contradictory holdings of the Court of Claims and the Supreme Court of Wisconsin, the United States Supreme Court found it unnecessary to decide the precise nature and extent of the hunting and fishing rights the Menominee enjoyed before termination. Instead, it simply adopted the view of the Court of Claims that the phrase, "to be held as Indian lands are held" includes the right to fish and to hunt free of state regulation. *Menominee Tribe*, 391 U.S. at 406, 88 S.Ct. at 1707 (citing *Menominee Tribe*, 388 F.2d at 1002). As the Supreme Court saw it, the only issue to be decided was whether "those rights, whatever their precise extent, have been extinguished." *Id.* at 407, 88 S.Ct. at 1708.

Because the United States Supreme Court refused to delineate the extent of the rights enjoyed by the Menominee before the passage of the Termination Act, its holding cannot be read as a factual finding that those rights existed as the consequence of a quid pro quo exchange, as defendants maintain. Although the Court quoted the state supreme court's observation that it was

unlikely the tribe would have given up the special fishing and hunting rights it enjoyed on its own lands in return for a reservation without such rights, it did so only in a footnote. Defendants characterize the finding as essential to the Court's decision but it was not. The Court could well have based its decision on the simple finding that the use of the term, "to be held as Indian lands are held," conveys exclusive hunting and fishing rights on a reservation, regardless what is exchanged for the grant. Consequently, I am not persuaded that plaintiff's claims in this suit are foreclosed by the doctrine of nonmutual issue preclusion.

I. *Treaty Right to Taking of Sturgeon – Count VI*

In Count VI, plaintiff alleges that the 1854 treaty reserved the sturgeon resource of the reservation for the exclusive right of the tribe. Plaintiff contends that because manmade obstructions prevent the sturgeon from getting to the reservation so that the tribe can harvest them, equitable arrangements should be made to enable plaintiff's members to take at least 50% of the available off-reservation sturgeon that would reach the reservation but for the obstructions. Plaintiff would agree to a smaller harvest if that is all that is necessary to allow tribal members to attain a moderate standard of living. This claim is entirely independent of the other five claims in which plaintiff contends that it retains rights to fish, hunt and gather off-reservation. Plaintiff may have special rights to the sturgeon that it can exercise even if it has no reserved or aboriginal off-reservation hunting and fishing rights. On the other hand, if plaintiff is correct

that it has off-reservation usufructuary rights, it will be irrelevant whether the tribe should be allowed to take sturgeon downstream of the reservation because at least some downstream harvesting would be encompassed by the off-reservation usufructuary rights.

Defendants take issue with the central premise of plaintiff's claim that the 1854 treaty guaranteed the tribe an on-reservation harvest of sturgeon. In addition, they dispute the legality of the tribe's proposed remedy, saying that it would exceed the outer limits of this court's equitable powers. They characterize the proposal as a rewriting of the treaty language and an expansion of the geographic scope of the area in which the tribe could exercise its usufructuary rights, both of which are actions that may be taken only by Congress and not by the courts.

I agree with plaintiff that at this stage of the litigation it is not possible to say how plaintiff's leaders understood the 1854 treaty as it related to the sturgeon resource. Plaintiff may be able to show that the sturgeon is central to the economic, social, cultural and spiritual life of the Menominee, *see* David R.M. Beck, *Return to Namä'o Uskíwämit: The Importance of Sturgeon in Menominee Indian History*, 70 Wisconsin Magazine of History at 37 (1995) (sturgeon receive frequent mention in Menominee mythology, where they are linked to tribe's origins, and they play a significant role in tribe's physical and spiritual sustenance). Plaintiff may be able to show also that the tribe would have understood any grant of reservation lands "to be held as Indian lands are held" as including continued access to the sturgeon resource. *See Menominee Tribe*, 391 U.S. at 406, 88 S.Ct. at 1707 ("[T]he language 'to

be held as Indian lands are held' includes the right to fish and to hunt. . . . The essence of the [1854] Treaty . . . was that the Indians were authorized to maintain on the new lands ceded to them as a reservation their way of life which included hunting and fishing.") I will assume without deciding that the Menominee may have believed that they could not maintain their way of life if they were deprived of the sturgeon resource, although I recognize that defendants have some support for their argument that the United States never intended to guarantee the Menominee a sturgeon harvest on their reservation.

It makes no difference whether plaintiff does or does not have a right to a sturgeon harvest because it has shown no legal basis for the remedy it seeks for the claimed deprivation of that right, that is, an equitable adjustment to allow tribal members to fish for sturgeon off-reservation free of state regulation. Such a remedy would amount to an impermissible rewriting of the treaty. "Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice." *Choctaw Nation of Indians,* 318 U.S. at 432, 63 S.Ct. at 678.

Plaintiff describes its request as similar to those of tribes who have sued successfully for equitable allocations of harvests to protect their treaty-reserved off-reservation fishing rights. Plaintiff cites *United States v. Winans,* 198 U.S. 371, 25 S.Ct. 662, as an example of a case in which the Supreme Court directed a lower court to make an adjustment in the fish harvest in order to protect the fishing rights of a tribe from the effects of "fish wheels" used by non-Indian fishers downstream of the tribe's usual and accustomed fishing spots. Without such an adjustment, the fish wheels would have captured the

entire run of fish, thereby preventing the tribe from exercising its usufructuary right under an 1859 treaty securing its right to take fish at all its usual and accustomed places in common with citizens of the territory. In addition, plaintiff cites *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977), a case in which the Supreme Court held that when a state was allocating a shared fishery resource between tribal and non-tribal fishers, it could take into account the on-reservation harvest, so as to prevent the treaty fishers from taking "the last living steelhead" and frustrating the rights of non-Indian fishers who had an "in-common" right to the resource.

Plaintiff argues that *Winans* shows that the courts can limit the harvest of non-Indian fishers in order to protect treaty fishing. By extrapolation, plaintiff maintains, this court can make an equitable adjustment in the sturgeon harvest to enable the tribe to harvest up to 50% of the available sturgeon that would reach the reservation. "[The] anadromous habits [of the sturgeon] render it a resource that must of necessity be shared with non-Indians downstream and off the reservation. Under these circumstances, at a minimum the Tribe is entitled to harvest up to 50% of the available sturgeon run that would reach the reservation." Pl.'s Brief, dkt. # 25, at 71-72. According to plaintiff, it follows from *Puyallup* that if a court is allowed to reach onto a reservation to make an equitable adjustment for the benefit of the Indian and non-Indian shared fishery, this court can reach off the reservation to protect the rights of the Menominee.

Plaintiff places special emphasis on the Northwest fishing cases, such as *Puyallup*, as well as *Washington v.*

Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979), which involve reserved treaty rights for the off-reservation exercise of usufructuary rights in common with non-Indian citizens. Plaintiff's case is of a different kind. The right it claims to an off-reservation sturgeon harvest does not rest on a reserved treaty right to go off-reservation to harvest sturgeon. Nothing in the 1854 treaty gave plaintiff any right to hunt or fish off-reservation. The treaty gave plaintiff only the right to hunt and fish on its own reservation free of state regulation. Thus, plaintiff's requested remedy is not like the remedies in the Northwest cases, in which the courts ordered steps be taken to protect the off-reservation fishing rights that had been reserved to the Indians. Plaintiff is asking for a reformation of the treaty to give it a right it was not granted under the treaty: the right to go off-reservation to exercise fishing rights. Plaintiff cannot argue that it reserved any such right because the 1854 treaty was not a grant *from* the tribe, as were the earlier treaties, but a grant *to* the tribe.

The interference with plaintiff's harvest comes not from other fishers but from the encroachment of industry, commerce and residential development that are the accompaniments of the westward expansion of European settlement and economic growth. In this respect, this case is like cases in which other tribes have sought to articulate a right to an environmental servitude that would require states to protect fishing habitats from environmental degradation. Although a number of commentators have advanced the idea that such a right should be recognized in order to protect treaty fishing rights, *see, e.g.*,

Gary D. Meyers, *United States v. Washington (Phase II) Revisited: Establishing an Environmental Servitude Protecting Treaty Fishing Rights*, 67 Or.L.Rev. 711 (1988); Thomas C. Galligan, Jr. & Michael T. Reynvaan, Comment, *Pacific Northwest Indian Treaty Fishing Rights*, U.Puget Sound L.Rev. 99 (1981), the concept has not fared well in the courts. It found acceptance by the district court in *United States v. Washington (Phase II)*, 506 F.Supp. 187 (W.D.Wash. 1980) (tribes' right to take fish included right to have treaty fishing habitat protected from environmental degradation), but not in the Court of Appeals for the Ninth Circuit, which overturned the district court's decision on appeal. *United States v. Washington*, 694 F.2d 1374, 1375 (9th Cir. 1982); *vacated on other grounds, United States v. Washington*, 759 F.2d 1353, 1356-60 (9th Cir. 1985) (en banc) (contrary to sound judicial discretion for district court to declare that right to take fish incorporates right to have treaty fish protected from manmade despoliation), *cert. denied*, 474 U.S. 994, 106 S.Ct. 407, 88 L.Ed.2d 358 (1985). In a recent case in Idaho, *Nez Perce Tribe v. Idaho Power Co.*, 847 F.Supp. 791, 804-810 (D.Idaho 1994), the district court dismissed a tribe's action for money damages against the Idaho Power Company for the negative effect its Snake River dams had on the chinook and steelhead runs.

Courts have limited the protection of Indian fishing rights to regulation of non-Indian fishers. In the Northwest cases and in the *Lac Courte Oreilles* litigation, the tribes prevailed when they requested that defendant state officials be required to impose limitations on the non-Indian fishers they regulated in order to ensure that treaty fishers could obtain their fair share of the treaty-

protected harvest. The tribes were not asking for fishing rights at locations other than the usual and customary places reserved for them by treaty or seeking to extend the geographical boundaries of the treaty-protected harvest area.

Making adjustments in the manner of harvesting off-reservation to ensure that both Indians and non-Indians have a fair share of the harvest is not the same as saying that tribal members may have access to state-regulated off-reservation areas to harvest a particular resource. I am aware of no case in which a court has ever granted an off-reservation harvesting right to make up for lost fishing or hunting opportunities on a reservation. The usual recourse for a tribe that claims the loss of a guaranteed usufructuary right is either to seek monetary compensation for the lost opportunity from Congress, the Court of Claims or the now-defunct Indian Claims Commission or to sue for an injunction preventing the construction of a dam or other obstruction or requiring that it be removed. *See, e.g., Confederated Tribes of Umatilla Indian Reservation v. Alexander,* 440 F.Supp. 553 (D.Or. 1977) (in suit to prevent construction of specific dam on ground it would deprive Indians of right to occupy fishing stations and prevent fish from swimming upstream, court found no authority for construction of dam in statute because statute did not show clear intent by Congress to abrogate treaty rights).

I conclude that plaintiff has not stated a claim in count VI on which relief could be granted in the requested form.

SUMMARY

Although plaintiff has not explained how it can show that the apparently clear language of the treaties into which it entered did not operate to terminate all of its rights, title and interest to its lands in the state of Wisconsin, including its usufructuary rights, it will be given the opportunity to make that showing and to develop the factual record in support of its contentions that the treaties are ambiguous and should be read as granting plaintiff usufructuary rights of indefinite duration. In addition, the parties will have an opportunity to clarify the record with respect to the prior proceedings before the Court of Claims and the Indian Claims Commission.

ORDER

IT IS ORDERED that the motion to dismiss of defendants Tommy G. Thompson, George E. Meyer, James T. Addis, John E. Fryatt, Herbert F. Behnke, Trygbe A. Solberg, Neal W. Schneider, Betty Jo Nelsen, Mary Jane Nelson, James E. Tiefenthaler, Jr., and Stephen D. Willett is GRANTED with respect to plaintiff's claim in count VI that it is entitled to go off-reservation to harvest sturgeon. In all other respects, defendants' motion is DENIED.

MENOMINEE INDIAN TRIBE OF WISCONSIN, Plaintiff,

v.

Tommy G. THOMPSON, Governor of the State of Wisconsin; George E. Meyer, Secretary, Wisconsin Department of Natural Resources; James T. Addis, Administrator of DNR Division of Resource Management; John E. Fryatt, Administrator of DNR Division of Enforcement; Herbert F. Behnke, Trygbe A. Solberg, Neal W. Schneider, Betty Jo Nelsen, Mary Jane Nelson, James E. Tiefenthaler, Jr. and Stephen D. Willett, Members of the Wisconsin Natural Resource Board, Defendants.

No. 95-C-30-C.

United States District Court,
W.D. Wisconsin.

Sept. 16, 1996.

Bruce R. Greene, Greene, Meyer & McElroy, P.C., Boulder, CO, for Menominee Indian Tribe of Wisconsin.

Charles D. Hoornstra, Asst. Atty. General, Madison, WI, for Defendants, State of Wisconsin, Wisconsin Natural Resources Bd., George E. Meyer, James T. Addis, John E. Fryatt, Tommy G. Thompson, Herbert F. Behnke, Trygbe A. Solberg, Neal W. Schneider, Betty Jo Nelsen, Mary Jane Nelson, James E. Tiefenthaler, Jr., Stephen D. Willett.

Paul M. Erspamer, Jastroch & La Barge, S.C., Waukesha, WI, for Lorman Anderson, Haze Diemel, Eureka Dam Campsite, Inc., Daniel F. Groeschel, Linda Wendt, Sturgeon for Tomorrow, Inc., Walleyes for Tomorrow, Inc., Wis. Fed. of Great Lakes Sport FIS.

Charles G. Curtis, Foley & Lardner, Madison, WI, for Wisconsin Paper Council, P.H. Glatfelter, Riverside Paper, Wisconsin Tissue Mills.

Kevin E. O'Neill, Milwaukee, WI, for Wisconsin Commercial Fish. (INTV).

OPINION AND ORDER

CRABB, District Judge.

This is a civil action in which plaintiff Menominee Indian Tribe of Wisconsin seeks declaratory and injunctive relief, asserting that it enjoys off-reservation rights to hunt, fish and gather without state restriction on the lands it ceded to the United States in 1831, 1836 and 1848 and that it has unextinguished aboriginal rights, derived from long uninterrupted use, to hunt and fish in various Wisconsin waters, including Lakes Winnebago and Michigan, the bay of Green Bay and portions of the Wisconsin River. In an opinion and order entered February 26, 1996, I considered defendants' motion to dismiss plaintiff's complaint on the grounds of failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6), judicial estoppel and issue and claim preclusion. I granted the motion with respect to plaintiff's claim that it was entitled to harvest Wolf River sturgeon in off-reservation, downstream portions of the Wolf River/Lake Winnebago ecosystem and denied the motion in all other respects. *See Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F.Supp. 184 (W.D.Wis. 1996).

Although I permitted plaintiff to proceed on its remaining claims, I noted that it was a close question

whether plaintiff's allegations of fact were sufficient to support its claims. *Id.* at 198. Plaintiff did not explain in its complaint why the Menominee had a different understanding of the apparently clear language of the treaties at the time it entered into them and why the treaty language did not terminate the usufructuary rights that it is claiming now. *Id.* at 216. Instead, plaintiff took the position that it would be unable to make this explanation until its experts had completed their review of "hundreds of documents" surrounding the treaty negotiations and had formulated their opinions about the meaning of the treaties and the tribe's understanding. Pl.'s Brief, dkt. # 25, at 25. Knowing that plaintiff had already had many months in which to formulate its theory of the case and, under Fed.R.Civ.P. 11, had an obligation to do so before filing its lawsuit, and recognizing the expense and inefficiency of proceeding with the case if plaintiff could not come forward with allegations of fact that would support its claims, I suggested that defendants submit contention interrogatories to plaintiff to flesh out the factual basis of the claims. *Id.* at 200. The contention interrogatories were not intended to require plaintiff to set forth the entire array of facts necessary to support its claims but merely to prod plaintiff to provide the factual allegations required to give the court and defendants an idea of the basic theory of its case.

On March 7, 1996, defendants filed a motion to reconsider the February 26 order with respect to the issue of judicial estoppel, or in the alternative to amend to allow for interlocutory appeal on that issue. On March 22, 1996, a hearing was held to consider defendants' motion, after which plaintiff was given 30 days to answer defendants'

contention interrogatories. After plaintiff responded to these interrogatories, defendants filed a renewed motion for reconsideration of all aspects of the February 26 order, this time focusing on plaintiff's answers to the interrogatories and contending that plaintiff had failed to provide sufficient allegations of fact in support of its claims. The two motions (defendants' March 7 motion (dkt. # 59) and June 4 renewed motion (dkt. # 78)) will be considered as two parts of a single motion to dismiss. In addition, the motion of the Wisconsin Paper Council to file and serve a reply brief in its role as amicus will be granted.

In addition to their motion for reconsideration, defendants have asked the court to take judicial notice of a letter of September 14, 1848 from Acting Secretary of War J. Mason to Commissioner W. Medill. *See* dkt. # 81. Because this document is unnecessary to the resolution of this case, I will deny the motion. However, I will take judicial notice of a number of other historical documents that help to clarify events surrounding the signing of the treaties at issue. Doing so accords with the rule that courts may take judicial notice of incontrovertible facts from documentary materials whose authenticity is not in question. *See Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1086 (2d Cir. 1982) (citing J. Moore, 10 *Moore's Federal Practice*, § 201.20), *cert. denied*, 493 U.S. 871, 110 S.Ct. 200, 107 L.Ed.2d 154 (1989). Plaintiff acknowledges the likelihood that "there will be no dispute as to the authenticity of a vast majority [of the documents], perhaps all of them," *see* Pl.'s Brief, dkt. # 91, at 17, but objects to the court's use of the documents at this time because of disputes that might arise after its experts have

had time to review them. If plaintiff believed that disputes might arise later concerning the authenticity of the documents or the accuracy of the information contained within them, it should have pointed out where such disagreements might arise. Plaintiff suggests also that "the documents cannot speak for themselves" without the benefit of expert interpretation, *id.* at 15, but I disagree. Expert testimony is not needed to interpret these documents. *See Sokaogon Chippewa Community v. Exxon Corp.*, 805 F.Supp. 680, 711 (E.D.Wis. 1992), *aff'd*, 2 F.3d 219 (7th Cir. 1993) (court is equipped to interpret treaties and letters written by lay persons in colloquial terms without expert testimony), *cert. denied*, 510 U.S. 1196, 114 S.Ct. 1304, 127 L.Ed.2d 655 (1994).

Even if the materials in question were not subject to judicial notice, it would be permissible to refer to them if doing so would help explain how the plaintiff might be able to support its claim. *See, e.g., Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909, 914-15 (7th Cir. 1985) (in reviewing lower court's grant of motion to dismiss for failure to state a claim, court could consider materials not of record "to show how accident might have happened"; plaintiff is free to give court unsubstantiated version of facts, so long as it is not inconsistent with the allegations of complaint, in order to show that dismissal is improper).

Accordingly, the historical documents submitted by the parties will be used and cited as necessary throughout the opinion. Consideration of such judicially noticeable documents does not convert this motion to one for summary judgment under Fed.Rule Civ.P. 56. *See Kramer*

v. Time Warner, Inc., 937 F.2d 767, 773 (2d Cir. 1991); *Mandarino v. Pollard*, 718 F.2d 845, 849 (7th Cir. 1983), *cert. denied*, 469 U.S. 830, 105 S.Ct. 116, 83 L.Ed.2d 59 (1984); *Dobiecki v. Palacios*, 829 F.Supp. 229, 232 (N.D.Ill. 1993).

Plaintiff contends that defendants' motion should be considered as a request for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) rather than as a Fed.R.Civ.P. 12(b)(6) motion because it was filed after defendants had answered the complaint, but plaintiff has not shown any reason for preferring one rule over the other. As plaintiff admits, the standards to be applied are essentially the same. The only real difference is that on a 12(c) motion the court is to consider the answer as well as the complaint. Accordingly, I will treat defendants' motions under Rule 12(c), but will draw amply from standards applicable to Rule 12(b)(6).

Plaintiff is correct that it is under no obligation at this stage of the litigation to *prove* facts in support of its claims. In contesting defendants' motions to dismiss, plaintiff may allege facts that would support its claims and the court must accept such allegations as true. Even so, plaintiff must still tie its factual allegations to specific treaty language, showing why, in light of the factual allegations, that language can be read to support its views.

After examining plaintiff's answers to the contention interrogatories and accompanying materials, the judicially noticeable documents and the relevant treaties, I am persuaded that even under the liberal standards of Fed.R.Civ.P. 12, plaintiff's allegations are insufficient to support its claims. Although plaintiff has added factual

allegations concerning its understanding of the relevant treaties, it is still unable to show that its understandings are supported by any language in the texts of the treaties. More important, if there is any doubt about plaintiff's loss of its usufructuary rights under the 1831 treaty, it is now clear that plaintiff's 1848 obligatory removal treaty extinguished all plaintiff's usufructuary rights in Wisconsin lands and waters. Any uncertainty about the effect of the 1848 treaty expressed in the last opinion, *see Menominee Indian Tribe*, 922 F.Supp. at 202-203, has been clarified by the judicially noticeable documents and a closer examination of the 1848 treaty language. Moreover, plaintiff's litigation in the state and federal courts, where it has sued over the years to recover damages for lost lands and usufructuary privileges, suggests strongly that plaintiff has understood all along that it gave up any permanent claim to off-reservation hunting, fishing and gathering rights when it signed the 1831 treaty.

Contrary to plaintiff's assertions, the law of the case doctrine does not preclude a court from reanalyzing determinations reached in an earlier opinion. *See Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1227 (7th Cir. 1995) (doctrine of law of the case is a presumption, not a straitjacket). Judges may examine their own previous rulings, if they are convinced that the earlier ruling was wrong and if rescinding it would not cause undue harm to any party. *Id. (citing Arizona v. California*, 460 U.S. 605, 618 n. 8, 103 S.Ct. 1382, 1391 n. 8, 75 L.Ed.2d 318 (1983)). Plaintiff has not shown that it has relied to its prejudice on the earlier ruling.

OPINION

I. PROCEDURAL STANDARDS AND CANONS OF CONSTRUCTION

The Federal Rules of Civil Procedure provide for a system of notice pleading pursuant to Rule 8, which requires only that the plaintiff set out a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). "The primary purpose of [Rule 8] is rooted in fair notice: under Rule 8, a complaint 'must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is.' " *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 775 (7th Cir. 1994) (citations omitted). In light of this liberal standard, a plaintiff can resist a 12(b)(6) motion to dismiss by setting out facts sufficient to outline the basis of its claim. *Panaras v. Liquid Carbonic Industries Corp.*, 74 F.3d 786, 792 (7th Cir. 1996); *see also Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) (motion to dismiss should be granted only if "it appears beyond doubt that [the plaintiff] can prove no set of facts in support of his claim which would entitle him to relief"); *Hrubec v. National R.R. Passenger Corp.*, 981 F.2d 962, 963 (7th Cir. 1992) ("A complaint need not narrate all relevant facts or recite the law; all it has to do is set out a claim for relief.") (citations omitted); *Redfield v. Continental Casualty Corp.*, 818 F.2d 596, 605 (7th Cir. 1987) (a plaintiff need not set out in detail the facts upon which his claim is based). Plaintiffs do not even need to plead facts, they can plead conclusions and then, when faced with a Rule 12 motion to dismiss, hypothesize facts that if proved would establish those conclusions. *Early v. Bankers Life & Casualty Co.*,

959 F.2d 75, 79 (7th Cir. 1992); *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457, 467 (D.C.Cir. 1991) (motion to dismiss is not tool for testing truth of allegations or for determining whether plaintiff has evidence to back up those allegations).

However, even the liberal notice pleading standards have their limits. If there is no "reasonable prospect" that the plaintiff can make out a valid claim from the facts narrated in the complaint, the court should grant the motion to dismiss. *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984); *see also Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir. 1993) (plaintiff may not "fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint"); *Matter of Wade*, 969 F.2d 241, 249 (7th Cir. 1992) (inferences plaintiffs asked court to draw from alleged facts were not reasonable), *cert. denied*, 510 U.S. 870, 114 S.Ct. 195, 126 L.Ed.2d 153 (1993); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1368 at 525 (1990) (inferences drawn in favor of nonmoving party must be reasonable and "cannot be indulged in when they are contrary to the clear and unambiguous words or actions of the parties or inconsistent with matters that fall within the judicial notice doctrine"). Plaintiffs have a responsibility to include allegations of fact sufficient to establish the crucial elements of their claims. *Forest County Potawatomi Community v. Doyle*, 828 F.Supp. 1401, 1405 (W.D.Wis. 1993), *aff'd*, 45 F.3d 1079 (7th Cir. 1995). If they file complaints that assert legal conclusions without making adequate factual allegations to support those conclusions, their complaints may be dismissed on Rule 12 grounds. *Panaras*, 74 F.3d at

792; *Strauss v. City of Chicago*, 760 F.2d 765, 767-68 (7th Cir. 1985). The same rules apply to cases involving treaty interpretation. Although many such cases do not lend themselves to resolution at the motion to dismiss stage, there is no reason not to resolve a case involving a treaty at this stage if the only issues are ones of law or if plaintiffs have not alleged facts sufficient to state a claim. *Menominee Indian Tribe*, 922 F.Supp. at 197 (citing cases).

Defendants contend that plaintiff has failed to provide even the minimal factual allegations necessary to survive a 12(c) motion. Although plaintiff has made numerous factual allegations in its answers to defendants' contention interrogatories, those allegations do not dictate plaintiff's success on this motion. Plaintiff cannot survive a 12(c) motion by alleging that it understood the treaties to mean something wholly inconsistent with the treaty's language without explaining how its understanding is supported by language in the treaties. *See Oneida Indian Nation*, 691 F.2d at 1096 (to survive a motion to dismiss plaintiff must allege facts from which it could reasonably be inferred that parties' agreement meant what plaintiff says it meant). The Court of Appeals for the Seventh Circuit has held that "[a] court need not accept as true a plaintiff's allegations concerning the meaning of an unambiguous contract." *Hoosier Energy Rural Elec. Coop. v. Amoco Tax Leasing IV Corp.*, 34 F.3d 1310, 1318 (7th Cir. 1994). Its admonition is equally applicable to treaties.

I noted in the February 26, 1996 opinion and order that caution is warranted when determining whether treaty language is ambiguous. *See Menominee Indian Tribe*, 922 F.Supp. at 199. Modern readers may think language is

clear when the parties to the treaty had a very different understanding of that same language. In determining treaty ambiguity, it is necessary to take careful consideration of the historical context to ascertain that the modern interpretation of the language gives effect to the true intentions of the parties. It is not entirely true to say, as defendants do, that extrinsic evidence can never be introduced to establish the ambiguity of contractual terms. Although that is the general rule, there is an exception for contracts whose language appears clear at the literal level but would not be so to someone knowledgeable about the particular subject matter. *See, e.g., United States v. National Steel Corp.*, 75 F.3d 1146, 1149 (7th Cir. 1996) (defining "intrinsic" ambiguity (ambiguity apparent to anyone reading contract) and "extrinsic" ambiguity (ambiguity apparent only to persons who know something about the subject matter)); *Bristow v. Drake Street Inc.*, 41 F.3d 345, 351-52 (7th Cir. 1994) ("Words in common usage may also bear technical meanings unknown to judges or juries unenlightened by testimony; and contractual language may be 'clear on its face' only because the outsider, the generalist, is unaware of understandings among insiders so deep that the need to express them is not felt.") It is possible that the treaties at issue include language that seems clear on its face to twentieth century readers but would have conveyed a different, ambiguous meaning to a person reading the same words in the early to mid-nineteenth century. That this is a possibility, however, does not relieve plaintiff of the obligation of identifying any latent or extrinsic ambiguities.

Although the treaties in this case "are not models of clarity or good draftsmanship," *id.*, their language indicates that plaintiff's claims are foreclosed. Plaintiff has failed to show otherwise, although it had a second opportunity to show that its claims were viable after I denied most of defendants' first motion to dismiss and suggested that defendants file contention interrogatories to determine which treaty provisions plaintiffs believed gave support to their claims. *See Sperling v. Hoffmann-La Roche, Inc.*, 924 F.Supp. 1396, 1401-02 (D.N.J. 1996) (courts may rely on contention interrogatories on Rule 12 motion).

Contention interrogatories are designed to help defendants discern the basis for the claims against them. *See Orthmann*, 757 F.2d at 915 (contention interrogatories require plaintiff to particularize its theory of suit). Like factual assertions made in the complaint, answers to these interrogatories must be accepted as true; plaintiffs are under no burden to prove the factual validity of their answers. When making such allegations in a treaty case, however, a plaintiff is not free to assert that it understood the treaties to mean something wholly different from what they appear to say unless it can show how its understanding is grounded in some textual ambiguity. Plaintiff has failed to provide this textual link. Even with the application of the canons of treaty construction to take into consideration the unequal bargaining power of the treaty signers, it is apparent now that plaintiff's claims fall short of the mark. Although treaties "are to be construed, so far as possible, in the sense in which the Indians understood them," the court cannot rewrite or expand them "beyond their clear terms to remedy a

claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 63 S.Ct. 672, 678, 87 L.Ed. 877 (1943); *see also South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506, 106 S.Ct. 2039, 2044, 90 L.Ed.2d 490 (1986) (court cannot rely on ambiguity in treaty that does not exist); *United States v. Choctaw & Chickasaw Nations*, 179 U.S. 494, 532, 21 S.Ct. 149, 164, 45 L.Ed. 291 (1900) (treaty cannot be interpreted inconsistently with clear import of its words).

II. PLAINTIFF'S CLAIMS

A. *Count I*

In Count I of its complaint, plaintiff contends that it retains treaty-reserved usufructuary rights in the territory it ceded under Article Sixth of the Treaty of 1831, 7 Stat. 342, on the east side of the Fox River and Green Bay, including "all waters within the area." The first paragraph of Article Sixth provided that

> The Menomonee [sic] Tribe of Indians shall be at liberty to hunt and fish on the lands they have now ceded to the United States, on the east side of the Fox river and Green bay, with the same privileges they at present enjoy, until it be surveyed and offered for sale by the President; they conducting themselves peaceably and orderly.

Defendants read this language to indicate that plaintiff's usufructuary rights in the ceded area were to continue only until the lands were surveyed or offered for sale, which occurred in 1834. Plaintiff makes four arguments in opposition to defendant's reading of the treaty,

contending that the Menominee did not understand Article Sixth to limit the tribe's usufructuary rights to a specific duration and maintaining that the tribe's rights were not extinguished by the sale of the land. First: the Menominee depended on hunting, fishing and gathering for food, shelter, clothing and commercial activities and would never have agreed to a treaty that gave the government the right to take away their sustenance. In a related argument, plaintiff suggests that it trusted the government to protect its interests and that it would have been inconceivable to the tribe that its "Great Father" would take away the tribe's critical usufructuary rights when those rights were necessary to nourish the tribe's members. Second: land ownership and usufructuary rights were distinct and separable considerations and the tribe would not have had usufructuary rights in mind when it believed it was making a treaty that concerned only land ownership. Third: the Menominee did not understand the technical concept, "surveyed and offered for sale by the President," because that concept could not have been translated adequately into the Menominee language. Fourth: even if the government could extinguish plaintiff's rights, it could do so only if the tribe were not conducting itself "peaceably and orderly" and the Menominee maintained peaceful relations with the United States.

1. *Dependence on usufructuary rights*

I dealt with plaintiff's first argument in the last opinion, noting that although plaintiff may very well have met its subsistence needs through hunting, fishing and gathering at the time of the treaties, the focus of the

inquiry today is not on what plaintiff needed at the time of the treaties but on what it agreed to in signing them. *See Menominee Indian Tribe*, 922 F.Supp. at 198. That plaintiff may have made a costly mistake in giving up its usufructuary rights in the 1831 treaty does not change what plaintiff agreed to in the treaty. It is no argument merely to state that plaintiff would not have agreed to relinquish rights because doing so would have been ill-conceived. No matter how bad the deal, it is not within the court's province to rewrite it. *See Choctaw and Chickasaw Nations*, 179 U.S. at 533, 21 S.Ct. at 164 (court cannot reform treaty to achieve justice or fairness); *United States v. Minnesota*, 466 F.Supp. 1382, 1385 (D.Minn. 1979) ("the courts cannot remake history or expand treaties and legislation beyond their clear terms to remedy a perceived injustice suffered by the Indians"), *affirmed sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905, 101 S.Ct. 279, 66 L.Ed.2d 136 (1980).

Plaintiff has not shown any reference to its subsistence needs in the treaty language. The Menominee may have trusted the United States, the "Great Father," to take the tribe's needs into consideration in making the treaty, but it does not follow that the United States agreed to do so in the manner the tribe allegedly anticipated, that is, by preserving the tribe's usufructuary rights. As the treaties demonstrate, the United States intended to turn the Menominee into domesticated farmers. *See* U.S. Agent Colonel Samuel Stambaugh, *Journal of the Proceedings of a Council at Green Bay*, July 18, 1831 at 10, dkt. # 71, tab 4 ("The land which was selected . . . for your farming country will furnish comfortable homes for yourselves,

your children and your children's children. I hope to live to see your fine fields covered with wheat, corn and potatoes.").[1] The 1831 treaty itself makes this intention clear. (Turning Indians into farmers was not necessarily as insensitive a bureaucratic solution as it has come to seem: in a report to the United States Secretary of War, United States Agent Stambaugh describes several Indian farming communities within or near the Menominee's territory, including cultivation of corn crops on Green Island in Green Bay and an Oneida settlement whose members were better farmers than the nearby French settlers. *See* U.S. Agent Stambaugh, Letter of November 8, 1831 at 571, 590-91, dkt. # 79, ex. B.) Article Fourth of the Treaty sets aside a reservation for the Menominee "upon which their improvements as an agricultural people are to be made." The purpose of the reservation was to "wean[ ] [the Menominee] from their wandering habits." Treaty of 1831, Art. 4th. The treaty did not promise open-ended usufructuary rights to the tribe. Rather, the United States recognized that it could not transform the Menominee into farmers overnight and it allowed the Menominee to continue to hunt, fish and gather until such time as the lands were "surveyed and offered for sale by the President." The United States intended, however, that

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[1] Plaintiff's responses to defendants' contention interrogatories contain a number of attachments. Dkt. # 71-72. Although plaintiff did not tab these attachments, defendants have provided an index that identifies the attachments by number. *See* Defs.' Brief, dkt. # 79, app. I will refer to the tab numbers identified by defendants in citing to the documents in plaintiff's attachments.

when that event took place, the rights that the treaty had left open would be extinguished.

Historical documentation submitted by plaintiff does not advance its assertion that it failed to understand that the terms of the 1831 treaty imposed a durational limit on its usufructuary rights. Several journal entries made by the treaty commissioner, U.S. Agent Stambaugh, show that the treaty had been read to the Menominee and that they claimed to understand it. *See* Stambaugh, *Journal of the Proceedings of a Council at Green Bay, supra*, at 2, 6-7, 8.

> John Carron, one of the two principal Chiefs of the Menominee Nation, then rose, and addressed his people as follows:
>
> > Brothers, you have all of you, chiefs, warriors, men, women, and children, heard here in open day . . . everything that our father has said. . . . I hope your eyes have been open, and everything our good Father has said to you has gone deep into your hearts. The things which have been done . . . [have] now been fuliy explained to us. It is a plain matter, and I am well pleased with it. . . . [Y]ou have heard by the treaty which our Father has just read to us. Are you satisfied? The Chiefs and Warriors replied with one voice in the usual manner, "yes."

Another chief stated, "We understand well the provisions of the Treaty as you have explained them to us." *Id.* at 16. Although it is possible that plaintiff's leaders did not grasp the full import of the treaty even though they claimed to, the fact that the United States went over the treaty with them makes it less likely that the tribe was unaware of the treaty's full significance.

2. *Distinction between land ownership and usufructuary rights*

Plaintiff's second argument is equally unavailing. Although plaintiff may not have thought it was relinquishing usufructuary rights in the 1831 treaty, its lack of understanding does not relieve it of its agreement to give up those rights. *See Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 180, 67 S.Ct. 650, 655, 91 L.Ed. 823 (1947) ("We cannot under any rule of interpretation, hold that the Indians owned the lands merely because they thought so.").

Plaintiff's repeated assertion that use rights and ownership rights are different adds nothing to its argument. Defendants do not deny that the two are distinct. That is not the issue. The issue is whether plaintiff gave up both rights in the 1831 treaty. With respect to that question, there is no ambiguity in paragraph 1 of Article Sixth of the treaty. The paragraph speaks of plaintiff's "liberty to hunt and fish on the lands they have now ceded." Although land ownership may have been the primary focus of the treaty, hunting and fishing rights were clearly at issue.

The arguments set forth in the report of plaintiff's expert, Thomas Lund, do not alter this result. *See* Thomas Lund, *The Menominee Treaty Privilege of 1831: In Modern Law is it an Interest in Land?*, Pl.'s answers to contention interrogatories, dkt. # 71, tab 1. Lund suggests that plaintiff's use rights reserved by the 1831 treaty were not interests in land but were instead a privilege and immunity from state regulation. Even if Lund's theory is correct, it does not change the fact that plaintiff's "privilege

and immunity" expired with the occurrence of the extinguishing events explicitly set forth in the 1831 treaty.

3. *Language barriers*

Plaintiff's third argument is that the tribe would not have understood the terms, "surveyed and offered for sale." In making this argument, plaintiff reveals a misunderstanding of what it must prove to establish that the 1831 treaty does not mean what it seems to. It is one thing for the tribe to show that a particular term would have had another meaning to treaty negotiators in the mid-nineteenth century; it is an entirely different thing for the tribe to say that its leaders would not have known the meaning of a particular term. An assertion of the first type would be relevant to determining the existence of a latent ambiguity; a claim of the second type, a lack of understanding by one party, is essentially immaterial. Unlike contracts between private parties, treaties must be enforced as written, even if they were obtained by fraud or duress. *See Menominee Indian Tribe*, 922 F.Supp. at 203 (citing cases).

Two of the treaties that the United States executed with the Chippewa provide examples of the kind of proof that will establish that the meaning of a treaty is something other than what it appears to be. In the 1837 treaty, the United States guaranteed the Chippewa that they could exercise their usufructuary rights in the territory they were ceding "during the pleasure of the President." *See United States v. Bouchard*, 464 F.Supp. 1316, 1323 (W.D. Wis. 1978), *rev'd on other grounds sub nom. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700

F.2d 341 (7th Cir. 1983), *cert. denied*, 464 U.S. 805, 104 S.Ct. 53, 78 L.Ed.2d 72 (1983). In 1842, the Chippewa ceded more land in another treaty that promised them "the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to move by the President" and made the Indians subject to removal from the territory "at the pleasure of the President." *Id.* at 1324. This condition is ambiguous: it can reasonably be read to mean that the Indians would be required to remove at the whim of the President or it could be read as saying that they would be able to stay as long as the President was happy with them, that is, if they did not misbehave. Extensive evidence confirmed that the second meaning was the one the negotiators for both sides had intended and understood. The United States had assured the Chippewa "that they would not be required to remove from their lands for a long time, possibly never, unless they misbehaved in some way." *Id.* at 1349.

The Menominee's asserted inability to understand the concept "surveyed and offered for sale by the President" might be relevant to the Menominee's understanding of the treaty, but it does not give the Menominee free license to invent an interpretation of the treaty that benefits them today. The Menominee need some type of textual link to support their interpretation. *See Lazore v. Commissioner of Internal Revenue*, 11 F.3d 1180, 1185 (3d Cir. 1993) (treaty arguments "must have a textual basis"). Plaintiff does not cite such a link and admits that the extinguishing events (the surveying and sale of the land) did take place.

4. *Menominee's peaceful relations with United States*

The tribe attempts to set forth a textual basis for its first claim with its last argument, focusing on its 1831 treaty right to retain "the same privileges they at present enjoy, until [the land was] surveyed and offered for sale by the President; they conducting themselves peaceably and orderly." Plaintiff contends that the Menominee were to lose their usufructuary rights only if its members failed to conduct themselves "peaceably and orderly." Ironically, this argument contradicts plaintiff's contention that it did not know that its usufructuary rights were even at issue. Plaintiff would have no reason to think its usufructuary rights were dependent on its conduct if it did not understand that its usufructuary rights were being negotiated.

Ignoring this apparent inconsistency, plaintiff cites a number of other treaties in which a tribe's continued usufructuary rights depended on its peaceable behavior. However, none of the cited treaties contain the same type of express extinguishment clauses found in the Menominee's 1831 treaty. For example, the Treaty of Greenville of 1795, 7 Stat. 49, allowed the affected tribes to "hunt within the [ceded territory] without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury to the people of the United States." The treaty said nothing about limiting this hunting right to such time as the President surveyed and offered it for sale. The Treaty with the Saginaw Chippewa of 1819, 7 Stat. 203, incorporated this same "peaceable behavior" clause into its text and did not contain any

other express extinguishing events. The Treaty of Washington of 1836 with the Ottawa and Chippewa of Michigan, 7 Stat. 491, permitted the tribes to retain their hunting rights as well as "the other usual privileges of occupancy, until the land is required for settlement."

The Ottawa and Chippewa treaty bears some resemblance to the 1831 treaty in that it appears to contain an extinguishing clause that is not dependent on the tribe's behavior. The extinguishing clause in the treaty has been interpreted as not extinguishing the tribes' right to fish, but as intended only to protect the right of non-Indians to settle in the ceded area without interference and to limit the Chippewa's right to hunt. Since the lakes were not needed for settlement, the tribes' reserved fishing rights were not terminated by the arrival of the non-Indians. *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199, 207 (1976). Nonetheless, none of the cited treaties change the fact that the 1831 treaty stated that the Menominee's ability to hunt and fish on the ceded lands could continue only "until it be surveyed and offered for sale by the President; they conducting themselves peaceably and orderly." The natural reading of that clause is that the Menominee could continue to hunt and fish on the ceded lands until the President sold the land but that their right to do so would expire before then if they did not behave in a peaceable fashion. The Menominee's behavior between 1831 and 1834 was peaceable and their rights were not extinguished during that time. However, the "peaceably and orderly" clause lost any relevance once the President surveyed and offered for sale the ceded lands in 1834. In any case, even if plaintiff understood the

"peaceably and orderly" clause to allow for the continuation of its usufructuary rights as long as it maintained amicable relations with the government and white settlers regardless of the President's sale of the land, any such right was extinguished by the Treaty of 1848, as explained in more detail later.

B. *Count II*

Like its first claim, plaintiff's second claim is based on Article Sixth of the 1831 Treaty. Plaintiff contends that it has retained usufructuary rights in that part of Menominee country "adjoining the farming country, on the west side of the Fox river" and all waters within that area. The second paragraph of Article Sixth of the 1831 Treaty described the boundaries of the Menominee's lands on the west side of the Fox River and provided that

> the boundary, as stated and defined in this agreement, of the Menomonee country, with the exception of the cessions herein before made to the United States, the Menomonee claim as their country; that part of it adjoining the farming country, on the west side of Fox river, will remain to them as heretofore, for a hunting ground, until the President of the United States, shall deem it expedient to extinguish their title. In that case, the Menomonee tribe promise to surrender it immediately, upon being notified of the desire of [the] Government to possess it.

Defendants argue that the "hunting ground" and any attendant usufructuary rights the tribe retained in this area expired when the President deemed it expedient to extinguish the Menominee's title in these lands in the

treaties of 1836 and 1848. Plaintiff takes a very different view. According to plaintiff, the treaty language "for a hunting ground, until the President of the United States, shall deem it expedient to extinguish their title" gave the United States the option of acquiring additional Menominee land in case it was needed for accommodation or recolonization of eastern Indians, an option the United States never exercised because the land ceded on the eastern side of the Fox River proved to be adequate for that purpose. *See* Stambaugh, Letter of November 8, 1831, *supra* (at time of 1831 treaty, Wisconsin was under consideration as colony site for eastern Indians). Plaintiff maintains that because the 1836 and 1848 treaties did not take the land for such a purpose and did not refer specifically to Article Sixth of the 1831 treaty, its usufructuary rights in these lands were never extinguished. Plaintiff argues also that Menominee leaders were surprised in 1836 when they learned that the United States interpreted the 1831 treaty to mean that the President could take the land west of the Fox River whenever he chose to do so. Apparently, the Menominee did not understand that to be what they had agreed to in 1831. Two of the Menominee leaders expressed concern about the interpretation of the 1831 treaty during the 1836 treaty negotiations. *See Journal of the Proceedings of a Council – Treaty of Cedar Point of 1836*, Aug. 29, 1836, dkt. # 72, tab 15. Chief Osh-Kosh stated:

> Father, we always thought that we owned the land that we occupied, but yesterday we heard that our great father had a right to take it when he wanted it. We do no[t] so understand the treaty. Father, here are some of the chiefs who went to Washington, who tell me that they only

> sold the land on the East side of the Fox River, and never bound themselves to their great father the president to sell that on the west side of the river and were much surprised when they heard that the chiefs had agreed to sell the rest, when the president chose to take it from them.

Id. at 4. Chief Gau-a-tau remarked:

> Father, it was understood by us that our land on the east side of the Fox river we ceded to our Great Father not no more; nor did we bind ourselves to our Great Father that he should purchase the balance of our land on west side when he should require it. Father, our great father told us at Washington that the balance of our land on the west side of the Fox river should remain to, and be ours, as long as we should live, and that we should have the right to give a piece of our land on the west side of the river to the half breeds of Menominee blood, and that the President would not want to purchase any more of our land.

Id. at 4-5.

Amicus Wisconsin Paper Council goes to great length explaining, with the aid of historical documentation, the flaws in plaintiff's contention that the extinguishment clause in paragraph 2 of Article Sixth was designed so that further land would be available if necessary for the recolonization of eastern Indians. *See* Wis. Paper Council's Brief, dkt. # 87, at 31-37. It is unnecessary to discuss the Paper Council's position because plaintiff's contention does not change the nature of the 1831 treaty, which provides that the President could extinguish the Menominee's title when he deemed it expedient. The treaty

does not say that the President could do so only if necessary to make room for recolonization. Similarly, it does not follow from the absence of any specific reference in the 1836 and 1848 treaties to Article Sixth of the 1831 treaty that those treaties could not extinguish plaintiff's usufructuary rights as provided in Article Sixth. Chief Osh-kosh may very well have been surprised when he realized in 1836 that the 1831 treaty permitted the President to take the land west of the Fox River when he so desired, but his response does not affect the meaning of the 1831 treaty. Chief Gau-a-tau's statement is more troubling. He explained that during 1831 treaty negotiations, the government told the Menominee that the land west of the Fox River would remain the tribe's as long as its members should live. Such a statement indicates that the United States may have misled the Menominee with respect to what the 1831 treaty would entail. However, the language in Article Sixth of the 1831 Treaty is not ambiguous with respect to the President's right to take the Menominee's land: he can do so when he finds it expedient. Even if the United States misled the Menominee on this point, this court cannot look beyond the clear treaty language and rewrite a treaty. Even treaties that are the product of bribery, fraud or duress are valid and must be enforced. *See Menominee Indian Tribe*, 922 F.Supp. at 203 (citing cases).

Plaintiff likens the 1831 treaty to the Chippewa's 1837 treaty considered in *Bouchard*, 464 F.Supp. at 1323, in which the Chippewa were permitted to remain on land they had ceded "[d]uring the pleasure of the President." I have discussed already the ambiguity and supporting evidence that led the court to find that the Chippewa's

usufructuary rights would last indefinitely unless they misbehaved. Unlike the Menominee, the Chippewa had a textual basis for their belief that their usufructuary rights were unextinguished. "During the pleasure of the President" could be interpreted to mean that the Chippewa's ability to retain usufructuary rights was tied to their behavior. The Menominee's lack of any similar textual basis is fatal to their claim. The 1831 treaty permits the President to take lands when he deems it expedient. His ability to do so is not conditioned in any way on his view of the tribe's behavior.

In response to defendants' contention interrogatory # 3, plaintiff alleges that the treaty commissioners told the tribe that its usufructuary rights would last indefinitely. Plaintiff supports this allegation by stating that it believed the "Great Father" would protect its interests. As previously discussed, the Menominee's faith in the "Great Father" is an insufficient basis on which to interpret the treaty in the manner plaintiff suggests. Nothing else in plaintiff's response indicates that the Menominee were told that their usufructuary rights would continue indefinitely. In fact, a passage from Colonel Stambaugh's journal refutes this assertion:

> You have now drawn a line between the countries of the white and red man. You have kept the side nearest to your western forests. This is right, some of your people will no doubt, remain hunters a few years longer. But after awhile I hope to see an Indian country thickly settled . . . and your rich lands will soon be covered with the comforts you so much require.

Stambaugh, *Journal of the Proceedings of a Council at Green Bay, supra,* at 19. Even if the government told plaintiff that its usufructuary rights would continue indefinitely, such a statement would not assist plaintiff, who would still need to show how that understanding was embodied in the text of the treaty or, at a minimum, show that the treaty did not preclude such an understanding, as the Chippewa did in the LCO litigation. *See Bouchard,* 464 F.Supp. 1316; *Lac Courte Oreilles Band,* 700 F.2d 341. Plaintiff has failed to make such a showing.

The Menominee argue that their continuing "to hunt, fish and gather all over the territory ceded in 1831, 1836 and 1848" is evidence that their usufructuary rights were not extinguished by the 1831 treaty. Such continued hunting does not prove that the tribe was exercising a legal right. *See Menominee Indian Tribe,* 922 F.Supp. at 201 (citing cases). Indeed, the historical documents contain several references to the government's displeasure with this activity and its efforts to put an end to it. *See* Annual Report of the Commissioner of Indian Affairs for 1846, at 256, dkt. # 72, tab 19 ("those Menominee still lingering on the ceded lands have engaged to remove (by small parties at a time) within the present and the coming year."); Annual Report of the Commission of Indian Affairs for 1855, at 41, dkt. # 72, tab 16 (Menominee have been advised "not to leave their reservation to rove through the country for the purpose of fishing, hunting, and gathering rice. . . . ").

C. *Counts III, IV and V*

Plaintiff's third, fourth and fifth claims are based on its alleged unextinguished aboriginal usufructuary rights in the waters of Lakes Michigan and Winnebago, Green Bay and part of the Wisconsin River. Defendants argue that plaintiff's asserted aboriginal usufructuary rights expired by the terms of the 1831 and 1836 treaties and contends further that even if they did not, the 1848 treaty extinguished those rights. Plaintiff acknowledges that the 1848 treaty was the government's attempt to acquire the remaining Menominee lands in Wisconsin and to remove the Menominee to Minnesota, but argues that cession of such lands did not include cession of its usufructuary privileges.

Five years after signing the Treaty of 1831, the Menominee executed the Treaty of 1836, 7 Stat. 506, in which the tribe ceded additional territory to the United States. *See Menominee Indian Tribe*, 922 F.Supp. at 193 (describing areas ceded). In addition, they agreed "to remove from the country ceded, within one year after the ratification of this treaty." Treaty of 1836, Art. 4th. As with their claims relating to the Treaty of 1831, the Menominee assert that they continued to hunt in the territories ceded in the Treaty of 1836 after the treaty was signed and thereby evidenced a belief that they maintained usufructuary rights and that the government accepted their claim to such rights. Although the Menominee may be correct that their continued usufructuary activities on the lands they ceded in 1836 are evidence of their belief that they continued to retain these rights, it does not appear that the government acceded to such a claim. *See* Annual

Report of the Commissioner of Indian Affairs for 1845, at 496, dkt. # 71, tab 6 ("[S]ome of [the Menominee] still linger on their old haunts along the shore of the Fox river and Green bay; but they will, it is believed, soon be removed to their own land, without difficulty or delay."). In any case, the Menominee's continued activity in the areas ceded in 1836 is immaterial in light of the obligatory removal treaty of 1848.

In 1848, plaintiff signed a treaty more monumental in scope than any of its previous treaties, in which it agreed it would "cede, and do hereby cede, sell and relinquish to the United States all [its] lands in the State of Wisconsin whenever situated" in exchange for new lands in Minnesota and monetary compensation. Treaty of 1848, 9 Stat. 952. A delegation of Menominee traveled to Minnesota and found the new lands unsuitable. Plaintiff decided that it would not move and negotiated another treaty in 1854, exchanging the Minnesota lands for the area of Wisconsin that became its reservation. Treaty of 1854, 10 Stat. 1064.

In the previous opinion, I noted that

> Enough questions persist about how the tribe perceived its obligations and cessions under the 1848 treaty to make it improper to hold as a matter of law that plaintiff could never show that the tribe understood the treaty as something far different from what it appears to be, that is, an in praesenti treaty of obligatory removal that by its nature would have had the effect of extinguishing all rights possessed by the tribe, including those of hunting and fishing.

Menominee Indian Tribe, 922 F.Supp. at 202. Defendants press plaintiff on this point in their contention interrogatories. In response, plaintiff explains that although it ceded lands in the 1848 treaty, it did not cede its usufructuary rights. Plaintiff recognizes that the 1836 and 1848 treaties were the types of removal treaties that generally extinguish all rights a tribe has in the lands from which it is removing. *See United States v. Michigan*, 471 F.Supp. 192, 240 (W.D.Mich.1979) (obligatory removal treaties use language obligating tribes to remove and set deadline for removal), *aff'd in part*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124, 102 S.Ct. 971, 71 L.Ed.2d 110 (1981). Nonetheless, plaintiff contends vigorously that its usufructuary rights remained intact because the President extended the tribe's permission to remain in Wisconsin for several years after the signing of the 1848 treaty and it continued to hunt and fish on the ceded lands.

A tribe's failure to remove pursuant to a valid removal treaty does not change the effect of that treaty; a tribe may not revoke the bargain by deciding not to remove. *See New York Indians v. United States*, 170 U.S. 1, 19-20, 18 S.Ct. 531, 534-35, 42 L.Ed. 927 (1898); *see also Bouchard*, 464 F.Supp. at 1350 n. 17 ("Whether the Indians actually complied with the [removal obligation] does not affect its legal status. A valid removal order would have left the Indians without any legal interest in the land. . . . "). Contrary to plaintiff's assertions, the court did not hold otherwise in *United States v. Michigan*. *See* 471 F.Supp. 192. The treaty in *Michigan* permitted removal "as soon as the said Indians desire it" and "[w]hen the Indians wish it" and did not require removal upon a fixed date or event. The court stated explicitly that the treaty was "at most . . . a

permissive removal treaty." *Id.* Thus, the treaty signed by the Ottawa and Chippewa in *Michigan* does not "parallel" the Menominee's situation in this case, as plaintiff argues.

It is unclear whether plaintiff believes that if it had moved to Minnesota its usufructuary rights in Wisconsin would have remained intact. As illogical as such an assertion appears, it is one that would have to be accepted if plaintiff is to prevail on its position. Plaintiff's usufructuary rights were either extinguished by the 1848 treaty or they were not. Its continued stay on the ceded lands does not change the effect of the treaty, which was not dependent on the tribe's removal to Minnesota. As plaintiff admits, the treaty required such removal.

In the February 26 opinion, I noted that plaintiff might be able to show that the 1848 treaty was contingent upon its exploratory trip to its new reservation and its right to remain in Wisconsin for an additional two years. *See Menominee Indian Tribe*, 922 F.Supp. at 202. In its answers to defendants' contention interrogatories, plaintiff does not explain how it might be able to prove that this contingency helped it to preserve its usufructuary rights. Instead, by maintaining that it did cede its land, plaintiff recognizes that the 1848 treaty was not contingent upon the exploratory trip or the removal. The plain language of the treaty supports this conclusion. Article 6th of the 1848 Treaty provided:

> To enable the said Indians to explore and examine their new country, and as an inducement to an early removal thereto, it is agreed that the United States will pay the necessary expenses of a suitable delegation to be selected for that purpose, under the direction of the President.

Nothing is said about the Menominee's right to revoke the deal if they found the lands unsuitable. Rather, the government hoped that by seeing the lands, the Menominee would move there at an even earlier date. *See* Annual Report of the Commissioner of Indian Affairs for 1849, at 13, dkt. # 87, app. (. . . "*as an inducement to their early removal*, the sixth article provides for the sending of an exploring party, to examine their new country, with reference to determining in advance the best points for their permanent settlement and the making of other preliminary arrangements.") (emphasis added).

The Menominee's right to remain on the lands ceded in the 1848 treaty expired on October 18, 1850, two years after the treaty was signed. Nonetheless, the Menominee petitioned the United States to permit them to remain past this date and prevailed on their petition. *See Wisconsin v. Lane*, 245 U.S. 427, 429-30, 38 S.Ct. 135, 135-36, 62 L.Ed. 377 (1918) (Menominee petitioned for and President granted leave to remain on ceded lands until June 1, 1851); Annual Report of the Commissioner of Indian Affairs for 1851, at 4-5, dkt. # 71, tab 9 (President consented to Menominee's request to remain another year past June 1, 1851 "with the distinct understanding that this extension of time was to be considered an act of favor"). In August 1852, Congress authorized the Menominee's temporary removal to a site on the Wolf and Oconto Rivers that was to become their present reservation. *Lane*, 245 U.S. at 430, 38 S.Ct. at 135-36.

Once the Menominee arrived on the reservation, the tribe appeared to understand that it did not have the free-ranging usufructuary rights that it claims now. In fact, the Annual Report of the Commissioner of Indian Affairs for

1853 shows that Menominee Chief Osh-kosh "ask[ed] permission to go away to gather rice." Annual Report of the Commissioner of Indian Affairs for 1853, at 52, dkt. # 71, tab 11. It seems unlikely that if the Menominee believed that they had retained usufructuary rights throughout the ceded lands, they would have asked permission to exercise such rights. The government reinforced the limitations imposed on the Menominee's usufructuary rights in 1855 when it instructed the tribe "not to leave their reservation to rove through the country for the purpose of fishing, hunting and gathering rice." Annual Report of the Commissioner of Indian Affairs for 1855, at 41-42, dkt. # 72, tab 16.

The Menominee gained their present reservation in an 1854 treaty ceding their Minnesota lands in exchange for the lands on the Wolf and Oconto rivers to which the tribe had removed in 1852. By ceding the Minnesota lands, the Menominee acknowledged that the 1848 treaty had taken effect even though they had not removed to Minnesota. Otherwise, the Menominee would not have had the lands in Minnesota to exchange for those on its new reservation. The situation is directly analogous to that in *New York Indians*, 170 U.S. 1, 18 S.Ct. 531, in which the New York Indians's failure to remove to the land set aside for them did not affect the validity of their removal treaty. The Menominee's failure to remove had no effect on the cession of all the tribe's ownership and usufructuary rights in their Wisconsin lands.

Notwithstanding this fact, plaintiff contends that the 1848 treaty conferred only lands upon the United States and did not include a cession of plaintiff's usufructuary rights. Plaintiff's argument rests on the language of the

1848 treaty that plaintiff agreed to "cede, and do[es] hereby cede, sell, and relinquish to the United States all [its] lands in the State of Wisconsin wherever situated." Plaintiff contends that its usufructuary rights were not actually rights or interests in the ceded lands but rather were a qualified immunity from regulation not tied to the land. Even accepting plaintiff's contention that its usufructuary rights are not interests in land, plaintiffs' argument does not account for the fact that the 1836 and 1848 treaties were valid removal treaties. Plaintiff's alleged right to remain in these areas for usufructuary purposes is wholly inconsistent with its responsibility to remove from them. *See New York Indians*, 170 U.S. at 19-20, 18 S.Ct. at 534-35.

Plaintiff's loss of its usufructuary rights in Wisconsin as a result of the 1848 obligatory removal treaty applies equally to rights in state waters. Although the 1848 treaty spoke of a cession of all of plaintiffs' "lands in the State of Wisconsin wherever situated," it is logically inconsistent to hold that the Menominee would retain usufructuary rights in Wisconsin waters but not in the ceded lands when they agreed to move hundreds of miles to the west. Given the purposes of the 1848 treaty, neither the government nor the Menominee could have contemplated that they would have the right to return from Minnesota to use Wisconsin waters as they pleased. Plaintiff's citations to historical documents to show that its members continued to fish in Wisconsin waters after the 1848 treaty are of no weight. Similarly, it is unnecessary to address plaintiff's arguments concerning its allegedly unextinguished aboriginal usufructuary rights in the Wisconsin River

Valley (Count V) and their "joint and amicable possession" with the Chippewa of that area. Any such rights were extinguished by the obligatory removal treaty of 1848.

III. PLAINTIFF'S UNDERSTANDING OF ITS RETAINED USUFRUCTUARY RIGHTS

Plaintiff's consistent theme in this litigation is that its members never understood that they were giving up their usufructuary rights when they entered into the treaties with the United States, but understood instead that the treaties had reserved those rights to the tribe. Plaintiff has argued that it would be error to read the 1831 treaty as setting explicit temporal limits on the tribe's rights to hunt and fish without exploring the tribe's understanding about the duration of its rights. It has maintained that it should have an opportunity to adduce evidence that would shed light on the tribe's understanding of what it bargained for and retained when it signed the various treaties, including, among other things, evidence of the tribe's subsequent actions to the extent that they are reflective of the tribe's understanding of the treaties.

Despite plaintiff's assertions that the tribe has always understood that it retained its use rights, its actions and statements over the last century suggest that this may not be so. Chief Osh-Kosh's request for permission to go outside the Wolf River reservation to gather wild rice certainly suggests that *he* did not believe the tribe remained free to exercise usufructuary rights in the territory it had ceded. Even if he was in error about the

matter, the tribe's subsequent representations to various courts and commissions are a strong indication that it has known for quite some time that it had lost its usufructuary rights.

As noted in the previous opinion, *Menominee Indian Tribe*, 922 F.Supp. at 209, in 1951, plaintiff petitioned the Indian Claims Commission for compensation to which it claimed entitlement because it had given up to the United States "all its right, title and interest in and to" the territory ceded in the 1831, 1836, 1848 and 1854 treaties. Plaintiff maintains now that this representation cannot be read as a reflection of an understanding that it had lost its usufructuary rights because 1) the tribe would not have made any reference to use rights before the claims commission, which was concerned with claims relating to land titles and not with lost hunting and fishing rights; 2) the commission existed to provide compensation for losses, not to declare rights or enjoin interference with their exercise; 3) plaintiff had no reason to include in its petition any claim for use rights because it had never lost such rights; and 4) the phrase, "all its right, title and interest in and to" lands was not intended to refer to hunting and fishing rights, which are neither a right to nor an interest in land but an immunity to hunt and fish without local regulation and would have been so understood by the commissioners.

Defendants have adduced extensive evidence from the public record that the claims commission was not only authorized to consider compensation for lost usufructuary rights but that it did so in a number of instances. The enabling legislation gave the commission a mandate to dispose of any and all claims that had

accrued before 1946, whether legal, equitable or moral. The commission was to hear and determine claims in law or equity arising under the Constitution, laws or treaties of the United States; other claims in law or equity; claims that would result if the treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake or any other ground cognizable by a court of equity; claims arising from the taking of lands by the United States without the agreed upon compensation; and claims "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Act of Aug. 13, 1946, ch. 959 sec. 2, 60 Stat. 1049.

It is not accurate to say, as plaintiff does, that the claims commission rarely dealt with claims for lost use rights or that it did not know how to value such rights independently of land value. The issue of usufructuary rights arose in various cases brought before the commission under the enabling legislation. *See, e.g., Makah Indian Tribe v. United States*, 7 Ind.Cl.Comm. 509, 524-25 (1959) (finding that United States had not violated 1855 treaty rights by destroying the tribe's rights of sealing and fishing because restrictions imposed on both activities were no more than what was reasonable and necessary to conserve the resource); *see also Confederated Tribes of the Colville Reservation v. United States*, 43 Ind.Cl.Comm. 505, 551 (1978) (compensation of more than $3 million awarded for difference in retail value of fish to which tribe was entitled, less value of fish actually received because United States had failed to preserve tribal entitlement); *Sioux Tribe v. United States*, 23 Ind.Cl.Comm. 358,

363, 368 (1970) (awarding compensation for lost hunting rights, including those that were intended to be merely temporary (lasting only so long as the buffalo herd remained large enough to justify hunt); *Bay Mills Indian Community v. United States of America*, 22 Ind.Cl.Comm. 79, 80 (1969) (commission described compensation award as covering fair market value of tribe's encampment and value of ceded fishing rights); *The Tlingit and Haida Indians of Alaska v. United States*, 20 Ind.Cl.Comm. 508, 511-12 (1969) (examining whether United States had obligation to prevent unfair and excessive encroachments upon Indians' fishing and hunting grounds). These cases are evidence that the scope of the commission's authority did extend to awards for lost usufructuary rights. They refute plaintiff's argument that the narrow scope of the commission's authority would have given plaintiff reason to think that the commission would not understand the reference to its loss of "all right, title and interest in and to" its former lands as not including usufructuary rights.

Plaintiff's second argument is a variation of the first. The tribe contends that it had no reason to raise any issue of usufructuary rights before the commission because plaintiff's actual dispute was with the state of Wisconsin, which was restricting the tribe from exercising its off-reservation use rights. The commission would have had no authority to declare the scope of plaintiff's rights with respect to the state or to order the state to compensate plaintiff for its century of interference with those rights. This is a plausible explanation for not bringing a claim of lost use rights to the commission for compensation. However, it does not explain why the tribe used the sweeping language it employed in its petition: "*all* right, title and

interest in and to" lands if, in fact, it had not lost its valuable right to hunt, fish and gather throughout its former territory free of state regulation.

In response to questions concerning why it utilized such broad language if it intended to make only a limited claim, plaintiff falls back on Professor Lund's characterization of usufructuary rights as unrelated to interests in land, arguing from his report that any settlement of its *land* claims would not have encompassed its usufructuary rights. Plaintiff asserts that because it was well established in 1951 that usufructuary rights were unrelated to interests or rights in land, neither the United States nor the commissioners would have understood the tribe's statement in its petition as referring to usufructuary rights. The fallacy in plaintiff's argument is that the courts have held reserved usufructuary rights to be interests related to land since at least 1905, when the Supreme Court decided *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089, a suit brought to enjoin certain persons in the state of Washington from obstructing the Yakima Nation's fishing rights. In holding that accommodations had to be made to ensure the Indians the fishing rights to which they were entitled, the Court characterized the reserved right to fish as imposing "a servitude upon every piece of land" ceded by the Yakima Nation. *Id.* at 381, 25 S.Ct. at 664. "[T]he Indians were given a right in the land – the right of crossing it to the river – the right to occupy it to the extent and for the purpose mentioned." *Id.* In 1916, the Supreme Court characterized a hunting and fishing right in the same way. *See Kennedy v. Becker*, 241 U.S. 556, 562, 36 S.Ct. 705, 707, 60 L.Ed. 1166 ("We assume that [the Seneca] retained an

easement [to hunt and fish], or profit *á prendre*, to the extent defined [in the Treaty of the Big Tree of 1797]). *See also Van Camp v. Menominee Enterprises, Inc.*, 68 Wis.2d 332, 343, 228 N.W.2d 664 (1975) (collecting scholarly writings characterizing usufructuary rights as interests in land in nature of *profit á prendre*); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir.) (scope of treaty-recognized non-reservation fishing rights are similar to a *profit á prendre*); *cert. denied*, 464 U.S. 805, 104 S.Ct. 53, 78 L.Ed.2d 72 (1983); *Lac du Flambeau Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 759 F.Supp. 1339, 1350 (W.D.Wis.1991) (Wisconsin's definition of real property includes interests such as treaty-reserved usufructuary privileges), *aff'd in relevant part; reversed in other parts*, 991 F.2d 1249, 1258 (7th Cir. 1993). In 1985, the United States Supreme Court held that when the Klamath Indians ceded "all their right, title and claim" to certain land, they gave up any off-reservation hunting and fishing rights as well and that subsequently, when it was discovered that the tribe's reservation boundaries were inaccurate and the Indians executed a cession agreement in 1901 under which they were compensated for the excluded land and ceded "all their claim, right, title and interest in and to" that land, the language used encompassed any right to fish and hunt on the excluded, non-reservation land. *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 770, 105 S.Ct. 3420, 3430, 87 L.Ed.2d 542 (1985). The Court was persuaded that although the Klamath tribe's hunting and fishing rights were not enumerated separately, "unquestionably," they were included in the conveyance. *Id.* at 766, 105 S.Ct. at 3428. The court of appeals had held that the omission

of any reference to hunting and fishing rights in the cession agreement was consistent with the interpretation that Congress had not intended to abrogate the use rights but the Supreme Court found that the court of appeals had erred in considering the rights separate from the tribe's land ownership; the 1864 treaty provided explicitly for the tribe to remove to their reservation and remain unless they had permission to leave temporarily and it gave the tribe an exclusive right of fishing and gathering on the reservation that would have been inconsistent with a hunting and fishing right off the reservation where exclusivity would have been impossible on lands open to non-Indians. *Id.* at 767, 105 S.Ct. at 3428-29. As additional support for the conclusion that the tribe had never understood that it had a right to hunt and fish separate from its interest in the land, the Court noted that the boundary commission report that preceded the 1901 agreement had made no separate valuation of the right to hunt and fish on the ceded lands, *id.* at 773, 105 S.Ct. at 3431-32, and that when the tribe had been afforded an opportunity additional compensation before the Indian Claims Commission for the ceded lands, it had agreed that the highest and best use for the ceded lands was commercial lumbering and livestock grazing and had made no reference to any hunting and fishing rights. *Id.* at 774, 105 S.Ct. at 3432 (citing *Klamath and Modoc Tribes v. United States,* 20 Ind.Cl.Comm. 522, 525 (1969)).

It is questionable, moreover, whether plaintiff can assert the position in this case that hunting and fishing rights are not interests in land when in another lawsuit, a corporation with which plaintiff is in privity prevailed on the position that hunting and fishing rights *are* interests

in land. In *Van Camp*, 68 Wis.2d 332, 228 N.W.2d 664, Menominee Enterprises, Inc. argued that it could not have made a valid transfer of any fishing and hunting rights to persons who purchased real estate from the corporation because such transfers would have been transfers of real property that were invalid for lack of stockholder approval and for failure to comply with the statute of frauds' requirement for the transfer of an estate or an interest in lands. *Id.* at 341-43, 228 N.W.2d at 669-70. The corporation argued exactly what plaintiff disavows in this case: that the hunting and fishing privileges at issue constituted an easement or a *profit á prendre* and are thus real property within the meaning of Wisconsin law. See Wis.Stat. ch. 706. As a corporation owned entirely by the members of the tribe, formed pursuant to the Menominee Termination Act, 25 U.S.C. § 891-902, to receive and manage all of the real and personal property that had been held in trust by the United States until the termination of federal supervision over the tribe's affairs and property, *id.* at 334-35, 228 N.W.2d at 665-66, Menominee Enterprises was in privity with the tribe. Under the doctrine of issue preclusion (collateral estoppel), plaintiff would be estopped from arguing that usufructuary rights are not interests in land; the judgment on the merits obtained by its privy in the *Van Camp* case precludes relitigation in a later suit of the issue of the nature of usufructuary rights, which was determined in the first suit. *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994) (citing *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 326, 75 S.Ct. 865, 867-68, 99 L.Ed. 1122 (1955)). Issue preclusion does not require that the claim in the first and second suits be identical. *Id.* "Rather, application of issue

preclusion centers around whether an issue of law or fact has been previously litigated." *Id.* (citing *International Order of Job's Daughters v. Lindeburg & Co.*, 727 F.2d 1087, 1091 (Fed. Cir. 1984)). "Issue preclusion is appropriate only if (1) the issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) the party to be precluded had a full and fair opportunity to litigate the issue in the first action." *Id.* (citing *A.B. Dick Co. v. Burroughs Corp.*, 713 F.2d 700, 702 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 1042, 104 S.Ct. 707, 79 L.Ed.2d 171 (1984)). Nothing in the *Van Camp* opinion suggests that any of these conditions was not met in that case.

In addition to the representations of total loss of *all* rights that plaintiff made to the claims commission, plaintiff has made similar representations to other courts. *See* discussion in *Menominee Indian Tribe*, 922 F.Supp. at 213, relating to plaintiff's suits for relief in the Wisconsin state courts and in the United States Court of Claims after the state began to regulate plaintiff's on-reservation hunting and fishing upon the federal government's termination of the tribe's reservation status in 1954. In its suit before the Court of Claims, plaintiff quoted the finding of the Supreme Court of Wisconsin in *State v. Sanapaw*, 21 Wis.2d 377, 124 N.W.2d 41 (1963), *cert. denied*, 377 U.S. 991, 84 S.Ct. 1911, 12 L.Ed.2d 1044 *reh'g denied*, 379 U.S. 871, 85 S.Ct. 17, 13 L.Ed.2d 78 (1964), that it was "unlikely that the Menominee would have knowingly relinquished their special fishing and hunting rights which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not exist." *Id.* at 383,

124 N.W.2d at 44. By advancing this finding to the Court of Claims and later, on appeal, to the United States Supreme Court, plaintiff seems to have adopted the position that, in fact, it had lost its off-reservation fishing and hunting rights in the nineteenth century.

These indications of plaintiff's understanding of the treaties are not determinative of its claim but they add support to the conclusion that plaintiff cannot succeed on its present assertion that the tribe understood the treaties as reserving their hunting and fishing rights.

IV. JUDICIAL ESTOPPEL

In the February 26 opinion, I noted that plaintiff's claims might be barred by the doctrine of judicial estoppel because it appeared that in previous legal proceedings the tribe had taken a position contrary to its present position that it has retained its usufructuary rights in the lands and waters of its former territory. *Menominee Indian Tribe*, 922 F.Supp. at 208. *See Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993) (judicial estoppel forbids a litigant from obtaining "a victory on one ground and then repudiat[ing] that ground in a different case in order to win a second victory"). The doctrine of judicial estoppel protects the integrity of the courts. *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598-99 (6th Cir. 1982). It is intended to prevent litigants from "playing fast and loose with the courts." *Id.*

Shortly after plaintiff filed its petition with the Indian Claims Commission, asserting that it had relinquished to the United States "all right, title and interest in and to"

the territory ceded in the 1831, 1836, 1848 and 1854 treaties, plaintiff settled all its claims with the United States through the Court of Claims, "including land claims arising under the Treaties of February 8, 1831, September 3, 1836, October 18, 1848 and May 12, 1854" for $8,500,000. *Id.* at 209. Plaintiff's acceptance of that settlement suggests that plaintiff succeeded in selling a position to the Court of Claims that is contrary to the position it is asserting today, which is that it did not lose *all* its rights, but retained its off-reservation usufructuary rights. I did not rule on the applicability of the doctrine in the February 26 opinion because some questions remained as to the linkage of the Indians Claims Commission petition and the Court of Claims settlement, *id.* at 212, but I allowed the parties an opportunity for additional briefing and oral argument on the question.

Because I have determined that plaintiff's claims must be dismissed on the merits, the applicability of judicial estoppel assumes less importance to the outcome of defendants' motion to dismiss. However, it bears further discussion.

As before, plaintiff argues that the doctrine of judicial estoppel cannot be applied to an Indian tribe because equitable defenses cannot be asserted to bar tribal claims arising from aboriginal occupancy of land. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 670, 99 S.Ct. 2529, 2539, 61 L.Ed.2d 153 (1979) (citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677, 94 S.Ct. 772, 782, 39 L.Ed.2d 73 (1974) (Indian title can be extinguished only with federal consent); *see also Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244 and n. 16, 105 S.Ct. 1245, 1256-57 and n. 16, 84 L.Ed.2d 169 (1985) (suggesting that equitable

doctrine of laches would not extinguish Indian title); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F.Supp. 780, 784 (D. Conn. 1976) (application of defenses of adverse possession, laches, waiver and estoppel to a suit by tribe to regain possession of Indian lands "inconsistent with federal posture of trust and vigorous protection of Indian rights"). As I explained in the February 26 opinion, defendants are not raising an equitable defense as a means of terminating plaintiff's interest in land; they are raising the defense to show both that plaintiff has always understood that it relinquished its usufructuary rights to the United States under the 1831 treaty or the 1848 treaty and that it sought and obtained compensation for the loss from the United States through a settlement entered into in 1951. Moreover, judicial estoppel is wholly different from laches, adverse possession and the statute of limitations, all of which are based upon delay and failure to assert one's rights. Such defenses of inaction are not properly raised against Indian tribes, which have had the status of wards in a position of trust with the United States. The doctrine of judicial estoppel is intended to apply to persons who have acted knowingly and intentionally. Finally, it is inaccurate to say that equitable defenses can never apply to Indian tribes. I am aware of no case holding that the doctrines of issue preclusion (collateral estoppel) or claim preclusion (res judicata) can never apply to an Indian tribe. Plaintiff has not cited any. *Cf. Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F.Supp. 1118, 1136-38 (D. Minn. 1994) (examining facts of Mille Lacs Band litigation to determine whether previous

litigation by Mole Lake Band had preclusive effect without suggesting that equitable doctrines of claim or issue preclusion could not apply to Indian tribes).

Plaintiff argues that no court has ever applied judicial estoppel to Indian land claims. It asserts that the doctrine is not applied to the United States, a sovereign power, and by extrapolation should not be applied to a sovereign tribe, but its citations do not support its basic premise. No court has held that the doctrine could not be applied to the United States and at least one court has done so. *See United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995) (Postal Service would be judicially estopped from arguing contrary to the position it had adopted in earlier litigation on which it had prevailed). A number of courts have refrained from applying the doctrine because they were persuaded that the facts did not support application, not because they believed it was improper as a matter of policy to apply it to the sovereign. *See, e.g., Levinson v. United States*, 969 F.2d 260, 265 (7th Cir.) (prior agreement by government not to seek fraud penalties not the same as saying that no fraud had occurred; therefore, federal government not barred by doctrine of judicial estoppel from arguing fraud), *cert. denied*, 506 U.S. 989, 113 S.Ct. 505, 121 L.Ed.2d 441 (1992); *Young v. United States Dept. of Justice*, 882 F.2d 633, 639 (2d Cir. 1989) (finding that government agent did not intend to mislead court when he applied for an order under Right to Financial Privacy Act to gain procedural advantage for government; there was room for difference of opinion whether act was applicable so that government is not barred from arguing that act does not apply to it as defense to plaintiff's claims that government violated act), *cert. denied*,

493 U.S. 1072, 110 S.Ct. 1116, 107 L.Ed.2d 1023 (1990). I conclude that no policy or rule of law prevents the application of judicial estoppel to Indian tribes.

Plaintiff no longer argues that defendants have failed to show that the settlement the tribe received in 1951 covered all of the claims it had made, both before the Indian Claims Commission and before the Court of Claims. Following the March 22, 1996 hearing on judicial estoppel, plaintiff received documents from the law firm that had represented the tribe in the Court of Claims and Indian Claims Commission in 1951. These documents connect the proceedings in the two forums. In a July 10, 1951 letter to the Attorney General of the United States, the tribe's attorney states:

> It is understood and agreed that the said joint motion and stipulation will not be filed with the Indian Claims Commission until a judgment in the sum of $8,500,000 has been entered by the United States Court of Claims in the case of *Menominee Tribe of Indians v. The United States*, No. 44304, . . . since the consideration for the dismissal of said petition before the Indian Claims Commission is the entry and payment of said judgment.

Letter of Andrew E. Stewart. Even though the letter establishes that the $8,500,000 was in settlement of all claims made in both proceedings, plaintiff continues to argue that its litigating posture in this case is not affected by its assertion in the 1951 petition to the Indian Claims Commission that it had given up "all its right, title and interest in and to" the territories ceded in the four nineteenth century treaties. In section III, *supra*, I discussed

plaintiff's arguments that it would not have included any claim for use rights because such claims were not within the scope of the commission's mandate and because it had not lost its use rights; and that neither plaintiff's attorneys nor the commissioners would have considered use rights to be rights or interests in and to lands, both because use rights are considered to be in the nature of an immunity from local regulation and not an interest tied to land as explained in the Lund report and because it was not until years later that the Supreme Court decided *Klamath*, 473 U.S. at 770, 105 S.Ct. at 3430, interpreting a similar phrase as encompassing use rights.

Although I continue to believe that plaintiff has taken positions in other courts that are inconsistent with its present position that it never lost its usufructuary rights and I am convinced that the doctrine of judicial estoppel applies to Indian tribes in the same way as it applies to other litigants, I am not persuaded that this is an appropriate case in which to apply the doctrine. Application of the doctrine of judicial estoppel is harsh medicine. It should be applied only upon a finding of intentional action; at a minimum, the party seeking application of the doctrine must show that its opponent has made an explicit representation in one proceeding that can be shown to be contrary to a representation in a subsequent proceeding. As strong as the indications are that plaintiff was asking for compensation for everything it had lost, including the opportunity to hunt and fish throughout its former territories free of unnecessary local regulation, it is not possible to say with certainty that plaintiff intended to represent to the claims commission that it had lost its use rights. Defendants are not able to cite any

evidence that plaintiff discussed this matter with its attorneys, that plaintiff made any reference to the rights in its representations to the commission or to the court of claims, that the United States asked specifically about use rights or even that the issue was brought to plaintiff's attention before it filed its petition. The parties reached a final settlement before plaintiff would have had an opportunity to explain to the commission exactly what it was referring to in its petition. I cannot say that plaintiff's prior statement was a knowing and intentional representation to the judicial officer, rather than a mistake or oversight.

It is one thing to say that a party's previous litigating posture is corroborative of its previous understanding of a particular point. It is another thing to say that the same litigating posture bars it from the courts. Thus, despite the many indications that plaintiff's understanding has always been that it lost its off-reservation hunting and fishing rights through its treaties with the United States, I am not prepared to hold that when it said in its petition that it had lost "*all* right, title and interest in and to" land, it is so evident that it was including its usufructuary rights that it is estopped from stating otherwise in any other judicial proceeding.

V. SUMMARY

In the February 26 opinion I expressed hesitation about dismissing this case without allowing plaintiff the opportunity to develop evidence demonstrating that the treaties should be read as granting the Menominee usufructuary rights of indefinite duration. *Menominee Indian*

Tribe, 922 F.Supp. at 216. However, now that it has become apparent that plaintiff cannot articulate a legitimate textual basis for its claims, I see no reason to delay a decision in this case. Although 20 months have passed since plaintiff filed this action, during which time plaintiff's experts have been researching and developing their theories, plaintiff has not come forward with any factual allegations linked to specific treaty language. Because plaintiff has failed to state a claim upon which relief may be granted and because it has given no indication that it will be able to do so in the future, dismissal on the merits is warranted.

ORDER

IT IS ORDERED that the motion of the Wisconsin Paper Council for leave to serve and file a reply amicus brief is GRANTED; the motion to reconsider of defendants Tommy G. Thompson, George E. Meyer, James T. Addis, John E. Fryatt, Herbert F. Behnke, Trygbe A. Solberg, Neal W. Schneider, Betty Jo Nelsen, Mary Jane Nelson, James E. Tiefenthaler, Jr. and Stephen D. Willett is GRANTED; and plaintiff's claims in Counts I, II, III, IV, and V of its complaint are DISMISSED in their entirety, with prejudice. The clerk of court is instructed to enter judgment for defendants and to close this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Plaintiff,

v.

TOMMY G. THOMPSON, Governor of the State of Wisconsin; GEORGE E. MEYER, Secretary, Wisconsin Department of Natural Resources; JAMES T. ADDIS, Administrator of DNR Division of Resource Management; JOHN E. FRYATT, Administrator of DNR Division of Enforcement; HERBERT F. BEHNKE, TRYGBE A. SOLBERG, NEAL W. SCHNEIDER, BETTY JO NELSEN, MAY JANE NELSON, JAMES E. TIEFENTHALER, JR. and STEPHEN D. WILLETT, Members of the Wisconsin Natural Resource Board,

Defendants.

OPINION AND ORDER

95-C-0030-C

Pursuant to Fed. R. Civ. P. 59(e), plaintiff has moved for reconsideration of the order entered herein on September 17, 1996 and to alter or amend the judgment entered the same day. Plaintiff maintains that it was error for the court to dismiss the case for failure to state a claim on which relief could be granted when it had not heard all the evidence, given the difficulties of understanding the written records and the need for interpretation of

those records by experts who can shed light on the cultural and historical context in which the treaties were negotiated.

According to 11 Charles A. Wright et al., *Federal Practice and Procedure* § 2810.1 (2d ed. 1995), a court has considerable discretion in deciding whether to grant or deny a motion brought under Rule 59(e). Grounds for doing so include 1) the necessity of correcting manifest errors of fact or law; 2) providing the moving party an opportunity to present newly discovered or previously unavailable evidence; 3) the necessity of preventing manifest injustice; or 4) an intervening change in the controlling law. *Id.* at 125-27. Plaintiff focuses on the first ground, contending that the court erred both in the manner in which it proceeded and in its analysis of the law.

I have made a careful review of plaintiff's motion, supporting briefs and expert reports in an effort to ensure that none of plaintiff's arguments has been overlooked or construed incorrectly. From that review, it appears that plaintiff's position remains essentially what it has been, that is, that only a trial will suffice to show how the Menominee understood the treaties. However, plaintiff has made greater effort than in its previous submissions to tie its arguments to the texts of the treaties, while still contending that it should not have to do so. For example, in its reply brief, it argues that the quest for the textual link is a chimera, that it is not necessary to tie an interpretation of the treaty to its particular words. According to plaintiff, another kind of ambiguity can exist, arising out of the context in which the treaties were negotiated. Plaintiff cites *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490 (7th Cir. 1993), a case involving the

overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-209. At issue was the applicability of a special overtime provision for law enforcement personnel. The commission argued that the provision should apply to its wardens; the United States argued it should not because the provision covered only "public agencies," which were defined to include state and federal governments or interstate governmental agencies. Indian tribes were not listed. The court of appeals held that "public agencies" included Indian tribes: although the literal language of the act would not alert a reader to the problem, it is obvious once one realizes that Indian police organizations exist. With that recognition, the phrase "public agencies" "becomes ambiguous, creating room for interpretation." *Id.* at 494.

I find plaintiff's reliance on *Great Lakes Fish & Wildlife Comm'n* puzzling. The case presents exactly the kind of textual link missing in plaintiff's presentation. The commission identified the problematic phrase ("public agency") and explained why it was ambiguous (Indian police were clearly governmental police; their omission from this statute had to have been an oversight since any rational scheme would include them had anyone thought of them). It is just this kind of explanation that plaintiff avoided making in its initial submissions.

A. 1831 Treaty

1. East side of Fox River

Article Sixth, First Paragraph, of the 1831 treaty contains a provision to the effect that the Menominee shall be at liberty to hunt and fish on the lands they have now

ceded to the United States "until it be surveyed and offered for sale by the President; they conducting themselves peaceably and orderly." Plaintiff argues that the phrase, "surveyed and offered for sale," is ambiguous because it does not make clear what acts constitute surveying and offering for sale or whether the requirement of peaceful and orderly conduct relates just to the time in which the land remains unsurveyed or lasts for perpetuity.

Whatever the term surveying might have meant to the Menominee in 1831, no one disputes that the activity has occurred. *See* plaintiff's response to contention interrogatories, dkt. #71, at 14: "The Tribe agrees that the land ceded in 1831 was indeed surveyed and offered for sale by the President"; *see also* plaintiff's brief in support of motion to alter or amend judgment, dkt. #109, at 38: "The Menominee continued to use the resources of the ceded territory [east of the Fox River] extensively throughout the 1830's and into the 1840's, until settlement made it relatively difficult and inefficient compared to more readily available areas." Any ambiguity about the time when plaintiff's liberty to hunt and fish would terminate is immaterial.

On this motion for reconsideration, plaintiff raises a variant of the arguments it made earlier. In this version, the 1831 agreement between the parties did not contemplate that the Menominee would suddenly lose its rights to hunt and fish anywhere within the ceded lands east of the Fox River as soon as the United States offered the first lot for sale. Instead, the parties understood that the Menominee would hunt and fish for as long as they wanted

except where private owners had either fenced off portions of the land, were farming actively or objected to tribal hunting and fishing, so long as the Menominee conducted themselves properly. The tribe believed its use rights would give way only in case of conflict, which plaintiff defines as interference with the uses of the land implicit in the rights of private ownership, in which case the tribe would have to move on to exercise its right on unoccupied land. In fact, that is what happened. The land was surveyed, offered for sale and settled and it became unsuitable to the Menominee for hunting and fishing. Thus, even if there is ambiguity about when and how the tribe's liberty to hunt and fish would end, there was no ambiguity about the fact that it would end at some point, regardless how well the Menominee conducted themselves. Nothing in the language of the 1831 treaty or in plaintiff's allegations supports reading the treaty as evincing the intention of the United States to give the tribe a usufructuary right that was neither tied to title nor limited in duration.

Plaintiff argues that an ambiguity arises from the fact that the treaty refers to fishing and hunting "on the lands" the tribe has now ceded and that the language of limitation, "surveyed and offered by sale by the President," refers only to lands. Plaintiff argues that since it is not possible to survey and offer water areas for sale, it is logical to assume that the treaty did not purport to limit the tribe's right to fish on water courses and areas such as the bay of Green Bay. Plaintiff does not acknowledge that it is more logical to read the two phrases consistently. If

"lands" encompasses fishing in the first phrase, it encompasses "fishing" in the second phrase. Moreover, the "liberty to hunt and fish" had a temporal limitation: it was to last until the land was surveyed and offered for sale. Whether surveying had anything to do with water is irrelevant. Once the surveying occurred, plaintiff's liberty to hunt or to fish came to an end.

2. West side of Fox River

With regard to the west side of the Fox River, discussed in Article Sixth, Second Paragraph, of the 1831 treaty, plaintiff argues that there is ambiguity in the language confirming that these lands would remain to the tribe as a hunting ground "until the President of the United States, shall deem it expedient to surrender it immediately, upon being notified of the desire of the Government to possess it." Plaintiff argues that "expedient" has two meanings in English: one is "advantageous" or "suitable"; another is "politic rather than just." Plaintiff asserts that it is not possible to know which meaning was used but if it was the first, it needs a referent: advantageous or suitable to whom? Also, plaintiff renews its argument that the Menominee would have understood that it would lose this land only if it was needed for the New York Indians, who were moving westward. When that need never materialized, the treaty clause was never implemented. In its reply brief, plaintiff enlarges on this argument. It asserts that the real ambiguity of the 1831 treaty is extrinsic: the treaty has to be read in context, understanding the overriding purpose of the treaty (resolving the issue of land for the New York Indians who are being moved to Wisconsin); the fact that

the United States did not seek a complete cession of the Menominee lands and was not sure at the time whether it would need additional lands for settlement of the New York Indians; the negotiations do not suggest a sweeping interpretation of the language; and neither the Menominee nor the interpreters present at the negotiations understood the language of the treaty to confer a broad unilateral power upon the President to terminate the tribe's title to the lands west of the Fox River.

Plaintiff's first argument is interesting, but it does not advance plaintiff's position. Assuming what seems unlikely, that the parties intended the word to have the interpretation most favorable to plaintiff and "expedient" was to mean advantageous to the tribe, it is still the case that the treaty made the usufructuary rights dependent upon plaintiff's title to the lands. Once the President extinguished the title to the lands by the treaties executed in 1836 and 1848, the Menominee lost the usufructuary rights that were tied to the tribe's title. This is true even if taking title through these treaties was not advantageous (expedient) to the tribe.

The second, more recently developed argument fails for the same reason. Even if the situation is exactly as plaintiff proposes and the treaty should be read narrowly as relating only to the needs of the government to accommodate the New York Indians, the 1848 treaty eliminated the tribe's last vestiges of title to the lands west of the Fox. With the loss of title, the tribe lost the use rights that were dependent on title.

B. 1836 Treaty

As to the 1836 treaty, plaintiff takes issue with the court's characterization of it as a removal treaty, saying that the Menominee's agreement to remove from the country they had ceded meant merely that they would move off the ceded lands to tribal lands that were unceded, not that they would remove from the territory altogether. In fact, according to plaintiff, the United States made no effort to enforce the provision. Plaintiff reiterates its position that this treaty did not have any effect on its previously reserved use rights because it was silent with respect to those rights. Given the relative unimportance of this treaty when compared to the 1848 treaty, plaintiff does not press its arguments and there is no need to address them again.

C. 1848 Treaty

The critical treaty is the one signed in 1848. Plaintiff disagrees that it was an obligatory removal treaty that extinguished any remaining usufructuary rights. I have discussed the nature of this treaty at length. Little purpose would be served by rehashing the arguments plaintiff made previously, so I will comment only on plaintiff's allegation that the Menominee were told and understood that they could "crawfish" out (back out) of their agreement to go west if they did not like the new lands set aside for them in Minnesota. This may well be true, but it does not change the treaty or its significance. The treaty took effect when it was signed, as shown by the fact that when the United States agreed not to force the Menominee to go west to lands they disdained, an entirely

new treaty was negotiated, and made supplementary and amendatory to the 1848 treaty. Plaintiff does not contend that it did not obtain an interest in the lands in Minnesota when it signed the treaty. Obviously, those lands were the consideration for the grant of the Wolf River Reservation to plaintiff in 1854. Instead, plaintiff repeats its previous argument that because the 1848 treaty did not make explicit reference to abrogation of the use rights and the tribe never abandoned those rights or relinquished them voluntarily under the treaty, the rights remain in the tribe. This argument is logically inconsistent with the concept of obligatory removal from the area in which the rights allegedly existed and it depends entirely on the flawed premise that the tribe's use rights were permanent in nature.

Plaintiff cites the Winnebago treaty of 1846 for the proposition that its own treaty of 1848 was never intended to address use rights. In the treaty with the Winnebago, the government paid $40,000 specifically for the tribe's release of its hunting privileges. Plaintiff argues that if the United States had wished to take the Menominee's use rights, it could have (and would have) followed the example of the Winnebago treaty and made explicit arrangements for doing so. Thus, it continues, the omission of any reference to the rights demonstrates that the government never intended to take these rights away from the Menominee. Plaintiff's argument would be stronger if it were not for the major difference between the situations in which the Winnebago and Menominee removal treaties were negotiated. The Winnebago had permanent, treaty-recognized hunting rights under a treaty negotiated in 1837, 7 Stat. 544, in which the tribe

agreed to relinquish the right to occupy, *except for the purpose of hunting*, a portion of certain lands west of the Mississippi granted to the tribe under a treaty negotiated in 1832, 7 Stat. 370. In the 1846 treaty, 9 Stat. 878, the tribe relinquished the lands granted them in 1832, including those on which they had retained a right of occupancy and use in the 1837 treaty, and they relinquished their hunting rights in the other lands. By contrast, the Menominee hunting rights were temporal; they had never been made permanent in any previous treaty. The Menominee received lands in exchange for the land it gave up in Wisconsin.

D. Lund Report

Underpinning much of plaintiff's argument is the report of Professor Thomas Lund, an expert in nineteenth century wildlife law. Lund posits that when the Menominee signed the 1831 treaty, they would have understood that the United States was ensuring them that they would have a license to take game from any unfenced land within the ceded area east of the Fox River free from government regulation and would not have understood they had an interest in land, such as would have entitled them to go upon private property for hunting and fishing. In addition, they would have expected that the same license would accompany any transfer of their interests in the land on the West side of the river. Thus, he says, when the tribe signed treaties in 1836 and 1848 giving up all right, title and interest to certain lands, it did not give up the license to take game free from government regulation, but retained it permanently. Professor Lund emphasizes the nineteenth century American understanding of

game as belonging to the sovereign and not to the landowner on whose land the game might be found at any particular time. With this understanding, he says, nineteenth century treaty negotiators (Indian or non-Indian) would not have thought of the right to take game as an interest in land. Setting aside defendants' point that Lund's report assumes a greater sophistication about the legal concepts of land ownership than is consistent with plaintiff's assertion that the Menominee would not have understood the meaning of technical terms in the treaties, it is difficult to accept Lund's characterization of plaintiff's usufructuary rights as a mere license rather than as a right to use the land. Doing so ignores two critical aspects of woodland Indian sustenance: wild rice and maple syrup. To say game is not tied either to land ownership or the right to enter upon land is perfectly logical; to say that wild rice and maple syrup are not is equally illogical. It is unimaginable that the Menominee would have agreed to a "liberty to hunt and fish" that did not include the ability to harvest rice and syrup. The importance they attached to gathering maple sap can be seen in the concerns they expressed about the New York Indians during the course of the 1831 negotiations. *See* Vol. I, attachments to plaintiff's answers to defendants' contention interrogatories, dkt. #71 [tab 5], *Journal of George Porter* of October 23, 1832, at M-11 and 12, in which the Menominee are quoted as saying:

> But we did not think that we were to give these N.Y. Indians a right to make Sugar on our Land, and cut down our Maple trees. When we were with our Great Father the President we told him that we would not allow these N.Y. Indians any thing. But he said to us, My Children if you like

me you must let these N.Y. Indians have a piece of your land; as much as will be necessary for them.

E. Summary

In summary, plaintiff alleges the following: the 1831 treaty gave the tribe a non-title-dependent usufructuary right (or privilege) of unlimited duration throughout its entire territory, ceded and unceded. Once it acquired this right, it could not lose it except by explicit action of the United States government. The so-called obligatory removal treaty of 1848 did not affect plaintiff's usufructuary rights because those rights were not title-dependent; indeed, they were not even rights in land but rather something in the nature of a qualified immunity from state regulation and thus were not included in any cession of rights and title to land contained in the 1848 treaty. Even if the usufructuary exercise is characterized as a right in land, it was not lost with the signing of the 1848 treaty because the treaty gave the Menominee the lands in Minnesota *plus* the opportunity to remain in Wisconsin and continue to exercise the tribe's usufructuary rights indefinitely, until the President required them to remove. When this never happened, the treaty "could not possibly have operated to terminate the Menominee use rights in Wisconsin." Plaintiff's brief in support of motion to alter, dkt. #109, at 56.

I am persuaded as a matter of law that plaintiff's theory of the case had no support in the language of the treaties. Plaintiff has identified no material ambiguity that would suggest it could prevail upon its claim. It has come forward with no allegation or argument that would

permit a finding that the 1831 treaty did not put a durational limit on the plaintiff's usufructuary rights (whether considered as rights in land or as privileges to be free from regulation). When the terminating events occurred, the usufructuary rights (or privileges) ended. I am persuaded as well that plaintiff has failed to allege any facts that would show that the 1848 treaty is anything other than an obligatory removal treaty that extinguished *at its signing* any remaining rights plaintiff may have possessed within or with respect to its former territory. The government's agreement to let plaintiff remain in Wisconsin for two years gave plaintiff nothing more than a conditional right to stay and to hunt, fish and gather while it remained. The agreement did not restore the usufructuary rights lost with the occurrence of the events specified in the 1831 treaty or with the signing of the 1848 treaty.

Plaintiff would have the treaties say something other than what they do. However beneficial that might be to the tribe, it is not permitted by the law. It is appropriate to quote the statement made by Judge Doyle eighteen years ago in another treaty case: "Even construing [the treaty] language liberally in favor of the Indians, I cannot construe it as not meaning what it clearly says." *United States v. Bouchard*, 464 F. Supp. 1316, 1337 (W.D. Wis. 1978), *reversed on other grounds, Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied*, 460 U.S. 805 (1983).

F. Defendants' Motion to Reconsider

In the brief in opposition to plaintiff's motion to alter or amend the judgment, defendants ask the court to

reconsider its refusal to find that plaintiff is judicially estopped from asserting a continued use right in the territory it ceded in the nineteenth century. I decline to do so.

ORDER

IT IS ORDERED that the motion of plaintiff Menominee Indian Tribe of Wisconsin to reconsider the order entered herein on September 17, 1996 and to alter or amend the judgment of the same day is DENIED. FURTHER, IT IS ORDERED that the motion of defendants to reconsider the refusal to find plaintiff judicially estopped from asserting a continued usufructuary right in the territory it ceded is DENIED.

Entered this 15th day of November, 1996.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

U.S. CONST., art. I, § 8, cl. 3

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. CONST., art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding.

ARTICLES OF AGREEMENT

Made and concluded at the City of Washington, this eighth day of February, one thousand eight hundred and thirty-one, between John H. Eaton, Secretary of War, and Samuel C. Stambaugh, Indian Agent at Green Bay, specially authorized by the President of the United States, and the undersigned chiefs and head men of the Menomonee nation of Indians, fully authorized and empowered by the said nation, to conclude and settle all matters provided for by this agreement.

The Menomonee Tribe of Indians, by their delegates in council, this day, define the boundaries of their country as follows, to wit;

On the *east* side of Green Bay, Fox river, and Winnebago lake; beginning at the south end of Winnebago lake; thence southeastwardly to the Milwauky or Manawauky river; thence down said river to its mouth at lake Michigan; thence north, along the shore of lake Michigan, to the mouth of Green Bay; thence up Green Bay, Fox river, and Winnebago lake, to the place of beginning. And on the *west* side of Fox river as follows: beginning at the mouth of Fox river, thence down the east shore of Green bay, and across its mouth, so as to include all the islands of the "Grand Traverse;" thence westerly, on the highlands between the lake Superior and Green bay, to the upper forks of the Menomonee river; thence to the Plover portage of the Wisconsin river; thence up the Wisconsin river, to the Soft Maple river; thence to the source of the Soft Maple river; thence west to the Plume river, which falls into the Chippeway river; thence down said Plume river to its mouth; thence down the Chippeway river thirty miles; thence easterly to the forks of the Manoy river, which falls into the Wisconsin river; thence down

the said Manoy river to its mouth; thence down the Wisconsin river to the Wisconsin portage; thence across the said portage to the Fox river; thence down Fox river to its mouth at Green bay, or the place of beginning.

The country described within the above boundaries, the Menomonees claim as the exclusive property of their tribe. Not yet having disposed of any of their lands, they receive no annuities from the United States: whereas their brothers the Pootowottomees on the south, and the Winnebagoes on the west, have sold a great portion of their country, receive large annuities, and are now encroaching upon the lands of the Menomonees. For the purposes, therefore, of establishing the boundaries of their country, and of ceding certain portions of their lands to the United States, in order to secure great and lasting benefits to themselves and posterity, as well as for the purpose of settling the long existing dispute between themselves and the several tribes of the New York Indians, who claim to have purchased a portion of their lands, the undersigned, chiefs and headmen of the Menomonee tribe, stipulate and agree with the United States, as follows:

First. The Menomonee tribe of Indians declare themselves the friends and allies of the United States, under whose parental care and protection they desire to continue; and although always protesting that they are under no obligation to recognise any claim of the New York Indians to any portion of their country; that they neither sold, nor received any value, for the land claimed by these tribes; yet, at the solicitation of their Great Father, the president of the United States, and as an evidence of their love and veneration for him, they agree that such part of the land described, being within the following

boundaries, as he may direct, may be set apart as a home to the several tribes of the New York Indians, who may remove to, and settle upon the same, within three years form the date of this agreement, viz: beginning on the west side of Fox river, near the "Little Kackalin," at a point known as the "Old Mill Dam;" thence northwest forty miles; thence northeast to the Oconto creek, falling into Green bay; thence down said Oconto creek to Green bay; thence up and along Green bay and Fox river to the place of beginning; excluding therefrom all private land claims confirmed, and also the following reservation for military purposes; beginning on the Fox river, at the mouth of the first creek above Fort Howard; thence north sixty-four degrees west to Duck creek; thence down said Duck creek to its mouth; thence up and along Green bay and Fox river to the place of beginning. The Menomonee Indians, also reserve, for the use of the United States, from the country herein designated for the New York Indians, timber and firewood for the United States' garrison, and as much land as may be deemed necessary for public highways, to be located by the direction, and at the discretion of the President of the United States. The country hereby ceded to the United States, for the benefit of the New York Indians, contains by estimation about five hundred thousand acres, and includes all their improvements on the west side of Fox river. As it is intended for a home for the several tribes of the New York Indians, who may be residing upon the lands at the expiration of three years from this date, and for none others, the President of the United States is hereby empowered to apportion the lands among the actual occupants at that time, so as not to assign to any tribe a greater number of acres than may

be equal to one hundred for each soul actually settled upon the lands, and if, at the time of such apportionment, any lands shall remain unoccupied by any tribe of the New York Indians, such portion as would have belonged to said Indians, had it been occupied, shall revert to the United States. That portion, if any, so reverting, to be laid off by the President of the United States. It is distinctly understood, that the lands hereby ceded to the United States for the New York Indians, are to be held by those tribes, under such tenure as the Menomonee Indians now hold their lands, subject to such regulations and alteration of tenure, as Congress and the President of the United States shall, from time to time, think proper to adopt.

Second. For the above cession to the United States, for the benefit of the New York Indians, the United States consent to pay the Menomonee Indians, twenty thousand dollars; five thousand to be paid on the first day of August next, and five thousand annually thereafter; which sums shall be applied to the use of the Menomonees, after such manner as the President of the United States may direct.

Third. The Menomonee tribe of Indians, in consideration of the kindness and protection of the Government of the United States, and for the purpose of securing to themselves and posterity, a comfortable home, hereby cede and forever relinquish to the United States, all their country on the southeast side of Winnebago lake, Fox river, and Green bay, which they describe in the following boundaries, to wit: beginning at the south end of Winnebago lake, and running in a southeast direction to Milwauky or Manawauky river; thence down said river

to its mouth; thence north, along the shore of lake Michigan, to the entrance of Green bay; thence up and along Green bay, Fox river, and Winnebago lake, to the place of beginning; excluding all private land claims which the United States have heretofore confirmed and sanctioned. It is also agreed that all the islands which lie in Fox river and Greenbay, are likewise ceded; the whole comprising by estimation, two million five hundred thousand acres.

Fourth. The following described tract of land, at present owned and occupied by the Menomonee Indians, shall be set apart, and designated for their future homes, upon which their improvements as an agricultural people are to be made: beginning on the West side of Fox river, at the "old Mill Dam" near the "Little Kackalin," and running up and along said river, to the Winnebago lake; thence along said lake to the mouth of Fox river; thence up Fox river to the Wolf river; thence up Wolf river to a point southwest of the west corner of the tract herein designated for the New York Indians; thence northeast to said west corner; thence southeast to the place of beginning. The above reservation being made to the Menomonee Indians for the purpose of weaning them from their wandering habits, by attaching them to comfortable homes, the President of the United States, as a mark of affection for his children of the Menomonee tribe, will cause to be employed five farmers of established character for capacity, industry, and moral habits, for ten successive years, whose duty it shall be to assist the Menomonee Indians in the cultivation of their farms, and to instruct their children in the business and occupation of farming. Also, five females shall be employed, of like

good character, for the purpose of teaching young Menomonee women, in the business of useful housewifery, during a period of ten years. – The annual compensation allowed to the farmers, shall not exceed five hundred dollars, and that of the females three hundred dollars. And the United States will cause to be erected, houses suited to their condition, on said lands, as soon as the Indians agree to occupy them, for which ten thousand dollars shall be appropriated; also, houses for the farmers, for which three thousand dollars shall be appropriated; to be expended under the direction of the Secretary of War. Whenever the Menomonees thus settle their lands, they shall be supplied with useful household articles, horses, cows, hogs, and sheep, farming utensils, and other articles of husbandry necessary to their comfort, to the value of six thousand dollars; and they desire that some suitable device may be stamped upon such articles, to preserve them from sale or barter, to evil disposed white persons: none of which, nor any other articles with which the United States may at any time furnish them, shall be liable to sale, or be disposed of or bargained, without permission of the agent. The whole to be under the immediate care of the farmers employed to remain among said Indians, but subject to the general controul of the United States' Indian Agent at Green Bay acting under the Secretary of War. The United States will erect a grist and saw mill on Fox river, for the benefit of the Menomonee Indians, and employ a good miller, subject to the direction of the agent, whose business it shall be to grind the grain, required for the use of the Menomonee Indians, and saw the lumber necessary for building on their lands, as also to instruct such young men of the

Menomonee nation, as desire to, and conveniently can be instructed in the trade of a miller. The expenses of erecting such mills, and a house for the miller to reside in, shall not exceed six thousand dollars, and the annual compensation of the miller shall be six hundred dollars, to continue for ten years. And if the mills so erected by the United States, can saw more lumber or grind more grain, than is required for the proper use of said Menomonee Indians, the proceeds of such milling shall be applied to the payment of other expenses occurring in the Green bay agency, under the direction of the Secretary of War.

In addition to the above provision made for the Menomonee Indians, the President of the United States will cause articles of clothing to be distributed among their tribe at Green bay, within six months from the date of this agreement, to the amount of eight thousand dollars; and flour and wholesome provisions, to the amount of one thousand dollars, one thousand dollars to be paid in specie. The cost of the transportation of the clothing and provisions, to be included in the sum expended. There shall also be allowed annually thereafter, for the space of twelve successive years, to the Menomonee tribe, in such manner and form as the President of the United States shall deem most beneficial and advantageous to the Indians, the sum of six thousand dollars, As a matter of great importance to the Menomonees, there shall be one or more gun and blacksmith's shops erected, to be supplied with a necessary quantity of iron and steel, which, with a shop at Green bay, shall be kept up for the use of the tribe, and continued at the discretion of the President of the United States. There shall also be a house for an

interpreter to reside in, erected at Green bay, the expenses not to exceed five hundred dollars.

Fifth. In the treaty of Butte des Morts, concluded in August 1827, an article is contained, appropriating one thousand five hundred dollars annually, for the support of schools in the Menomonee country. And the representatives of the Menomonee nation, who are parties hereto, require, and it is agreed to, that said appropriation shall be increased five hundred dollars, and continued for ten years from this date, to be placed in the hands of the Secretary at War, in trust for the exclusive use and benefit of the Menomonee tribe of Indians, and to be applied by him to the education of the children of the Menomonee Indians, in such manner as he may deem most advisable.

Sixth. The Menomonee tribe of Indians shall be at liberty to hunt and fish on the lands they have now ceded to the United States, on the east side of Fox river and Green bay, with the same privileges they at present enjoy, until it be surveyed and offered for sale by the President; they conducting themselves peaceably and orderly. The chiefs and Warriors of the Menomonee nation, acting under the authority and on behalf of their tribe, solemnly pledge themselves to preserve peace and harmony between their people and the Government of the United States forever. They neither acknowledge the power nor protection of any other State or people. A departure from this pledge by any portion of their tribe, shall be a forfeiture of the protection of the United States' Government, and their annuities will cease. In thus declaring their friendship for the United States, however, the Menomonee tribe of Indians, having the most implicit confidence in their great father, the President of the United

States, desire that he will, as a kind and faithful guardian of their welfare, direct the provisions of this compact to be carried into immediate effect. The Menomonee chiefs request that such part of it as relates to the New York Indians, be immediately submitted to the representatives of their tribes. And if they refuse to accept the provision made for their benefit, and to remove upon the lands set apart for them, on the west side of Fox river, that he will direct their immediate removal from the Menomonee country; but if they agree to accept of the liberal offer made to them by the parties to this compact, then the Menomonee tribe as dutiful children of their great father the President, will take them by the hand as brothers, and settle down with them in peace and friendship.

The boundary, as stated and defined in this agreement, of the Menomonee country, with the exception of the cessions herein before made to the United States, the Menomonees claim as their country; that part of it adjoining the farming country on the west side of Fox river, will remain to them as heretofore, for a hunting ground, until the President of the United States, shall deem it expedient to extinguish their title. In that case, the Menomonee tribe promise to surrender immediately, upon being notified of the desire of Government to possess it. The additional annuity then to be paid to the Menomonee tribe, to be fixed by the President of the United States. It is conceded to the United States that they may enjoy the right of making such roads, and of establishing such military posts, in any part of the country now occupied by the Menomonee nation, as the President at any time may think proper.

As a further earnest of the good feeling on the part of their great father, it is agreed that the expenses of the Menomonee delegation to the city of Washington, and of returning, will be paid, and that a comfortable suit of clothes will be provided for each; also, that the United States will cause four thousand dollars to be expended in procuring fowling guns, and ammunition for them; and likewise, in lieu of any garrison rations, hereafter allowed or received by them, there shall be procured and given to said tribe one thousand dollars worth of good and wholesome provisions annually, for four years, by which time it is hoped their hunting habits may cease, and their attention be turned to the pursuits of agriculture.

In testimony whereof, the respective parties to this agreement have severally signed the same, this 8th February, 1831.

JOHN H. EATON,
S. C. STAMBAUGH.

Kaush-kau-no-naive, Grizzly Bear,
A-ya-mah-taw, Fish Spawn,
Ko-ma-ni-kin, Big Wave,
Ko-ma-ni-kee-no-shah, Little Wave,
O-ho-pa-shah, Little Whoop,
Ah-ke-ne-pa-weh, Earth Standing,
Shaw-wan-noh, The South
Mash-ke-wet,
Pah-she-nah-sheu,
Chi-mi-na-na-quet, Great Cloud,
A-na-quet-to-a-peh, Setting in a Cloud,
Sha-ka-cho-ka-mo, Great Chief.

Signed, sealed, and delivered in presence of R. A. Forsyth, C. A. Grignon, Interpreters. A. G. Ellis. Richard

Pricket, U. S. Interpreter. William Wilkins, of Pennsylvania. Samuel Swartwout, New York. John T. Mason, Michigan. Rh. M. Johnson, Kentucky.

Note. – In the 1st article, third line from the end of it, at page 7th, the words *"and alteration of tenure"* were interlined with the consent and approval of all the parties who signed the same.

In presence of Robert A. Forsyth, C. A. Grignon, John T. Mason, P. G. Randolph, Law: L. V. Kleeck, A. G. Ellis.

WHEREAS certain articles of agreement were entered into and concluded at the city of Washington, on the 8th day of February instant, between the undersigned, Commissioners on behalf of the United States, and the chiefs and warriors, representing the Menomonee tribe of Indians, whereby a portion of the Menomonee country, on the northwest side of Fox river and Green bay, was ceded to the United States, for the benefit of the New York Indians, upon certain conditions and restrictions therein expressed: And whereas it has been represented to the parties to that agreement, who are parties hereto, that it would be more desirable and satisfactory to some of those interested that one or two immaterial changes be made in the *first* and *sixth* articles, so as not to limit the number of acres to one hundred for each soul who may be settled upon the land when the President apportions it, as also to make unlimited the time of removal and settlement upon these lands by the New York Indians, but to leave both these matters discretionary with the President of the United States.

Now, therefore, as a proof of the sincerity of the professions made by the Menomonee Indians, when they

declared themselves anxious to terminate in an amicable manner, their disputes with the New York Indians, and also as a further proof of their love and veneration for their great father, the President of the United States, the undersigned, representatives of the Menomonee tribe of Indians, unite and agree with the Commissioners aforesaid, in making and acknowledging the following supplementary articles a part of their former aforesaid agreement.

First. It is agreed between the undersigned, commissioners on behalf of the United States, and the Chiefs and warriors representing the Menomonee tribe of Indians, that, for the reasons above expressed, such parts of the *first* article of the agreement, entered into between the parties hereto, on the eighth instant, as limits the removal and settlement of the New York Indians upon the lands therein provided for their future homes, to three years, shall be altered and amended, so as to read as follows: That the President of the United States shall prescribe the time for the removal and settlement of the New York Indians upon the lands thus provided for them; and, at the expiration of such reasonable time, he shall apportion the land among the actual settlers, in such manner as he shall deem equitable and just. And if, within such reasonable time, as the President of the United States shall prescribe for that purpose, the New York Indians, shall refuse to accept the provisions made for their benefit, or having agreed, shall neglect or refuse to remove from New York, and settle on the said lands, within the time prescribed for that purpose, that then, and in either of these events, the lands aforesaid shall be, and remain the property of the United States, according to said *first*

article, excepting so much thereof, as the President shall deem justly due to such of the New York Indians, as shall actually have removed to, and settled on the said lands.

Second. It is further agreed that the part of the sixth article of the agreement aforesaid, which requires the removal of those of the New York Indians, who may not be settled on the lands at the end of three years, shall be so amended as to leave such removal discretionary with the President of the United States. The Menomonee Indians having full confidence, that, in making his decision, he will take into consideration the welfare and prosperity of their nation.

Done and signed at Washington, this 17th of February, 1831.

JOHN H. EATON,
S. C. STAMBAUGH.

Kaush-kau-no-naive,
A-ya-ma-taw,
Ko-ma-ni-kin,
Ko-ma-ni-kee-no-shah,
O-ho-pa-sha,
Ah-ke-ne-pa-weh,
Sha-wan-noh,
Mash-ke-wet,
Pah-she-na-sheu,
Chi-mi-na-na-quet,
A-no-quet-to-a-peh,
Sha-ka-cho-ka-mo.

Signed in presence of R. A. Forsyth, C. A. Grignon, Law. L. V. Kleeck, John T. Mason, P. G. Randolph, A. G. Ellis.

To the Indian names are subjoined a mark and seal.

[NOTE. – This treaty was ratified with the following Proviso contained in the Resolution of the Senate:

Provided, That for the purpose of establishing the rights of the New York Indians, on a permanent and just footing, the said treaty shall be ratified with the express understanding that two townships of land on the east side of the Winnebago lake, equal to forty-six thousand and eighty acres shall be laid off, (to commence at some point to be agreed on,) for the use of the Stockbridge and Munsee tribes; and that the improvements made on the lands now in the possession of the said tribes, on the east side of the Fox river, which said lands are to be relinquished, shall, after being valued by a commissioner to be appointed by the President of the United States, be paid for by the Government: *Provided*, however, that the valuation of such improvements, shall not exceed the sum of twenty-five thousand dollars: and that there shall be one township of land, adjoining the foregoing, equal to twenty-three thousand and forty acres, laid off and granted for the use of the Brothertown Indians, who are to be paid, by the Government the sum of one thousand six hundred dollars for the improvements on the lands now in their possession, on the east side of Fox river, and which lands are to be relinquished by said Indians: Also, that a new line shall be run, parallel to the southwestern boundary line, or course of the tract of five hundred thousand acres described in the first article of this treaty, and set apart for the New York Indians, to commence at a point on the west side of the Fox river, and one mile above the Grand Shute on Fox river, and at a sufficient distance from the said boundary line as established by

the said first article, as shall comprehend the additional quantity of two hundred thousand acres of land, on and along the west side of Fox river, without including any of the confirmed private land claims on the Fox river, and which two hundred thousand acres shall be a part of the five hundred thousand acres intended to be set apart for the Six Nations of the New York Indians and the St. Regis tribe; and that an equal quantity to that which is added on the southwestern side shall be taken off from the northeastern side of the said tract, described in that article, on the Oconto Creek, to be determined by a Commissioner, to be appointed by the President of the United States; so that the whole number of acres to be granted to the Six Nations, and St. Regis tribe of Indians, shall not exceed the quantity originally stipulated by the treaty."]

TREATY WITH THE MENOMINEE NATION.

WHEREAS articles of agreement between the United States of America, and the Menominee Indians, were made and concluded at the city of Washington, on the eighth day of February A. D. one thousand eight hundred and thirty-one, by John H. Eaton, and Samuel C. Stambaugh, Commissioners on the part of the United States, and certain Chiefs and Headmen of the Menominee Nation, on the part of said nation; to which articles, an addition or supplemental article was afterwards made, on the seventeenth day of Februry [sic] in the same year, by which the said Menominee Nation agree to cede to the United States certain parts of their land; and that a tract of country therein defined shall be set apart for the New York Indians. All which with the many other stipulations therein contained will more fully appear, by reference to the same. Which said agreements thus forming a *Treaty*, were laid before the Senate of the United States during their then session: but were not at said session acted on by that body. Whereupon a further agreement was on the fifteenth day of March, in the same year, entered into for the purpose of preserving the provisions of the treaty, made as aforesaid; by which it was stipulated that the said articles of agreement, concluded as aforesaid, should be laid before the next Senate of the United States, at their ensuing session; and if sanctioned and confirmed by them, that each and every article thereof should be as binding and obligatory upon the parties respectively, as if they had been sanctioned at the previous session. *And whereas* the Senate of the United States, by their resolution of the twenty-fifth day of June, one thousand eight hundred and thirty-two, did advise and consent to

accept, ratify and confirm the same, and every clause and article thereof upon the *conditions* expressed in the proviso, contained in their said resolution: which proviso is as follows: "Provided that for the purpose of establishing the rights of the New York Indians, on a permanent and just footing, the said treaty shall be ratified, with the express understanding that two townships of land on the east side of Winnebago Lake, equal to forty-six thousand and eighty acres shall be laid off (to commence at some point to be agreed on) for the use of the Stockbridge and Munsee tribes; and that the improvements made on the lands now in the possession of the said tribes on the east side of the Fox river, which said lands are to be relinquished shall, after being valued by a commissioner to be appointed by the President of the United States, be paid for by the Government: Provided, however, that the valuation of such improvements shall not exceed the sum of twenty-five thousand dollars. And that there shall be one township of land adjoining the foregoing, equal to twenty-three thousand and forty acres laid off and granted for the use of the Brothertown Indians, who are to be paid by the Government the sum of one thousand six hundred dollars for the improvements on the lands now in their possession, on the east side of Fox river, and which lands are to be relinquished by said Indians: also that a new line shall be run, parallel to the southwestern boundary line or course of the tract of five hundred thousand acres, described in the first article of this treaty, and set apart for the New York Indians, to commence at a point on the west side of the Fox river, and one mile above the Grand Shute, on Fox river, and at a sufficient distance from the said boundary line as established by

the said first article, as shall comprehend the additional quantity of two hundred thousand acres of land on and along the west side of Fox river, without including any of the confirmed private land claims on the Fox river; and which two hundred thousand acres shall be a part of the five hundred thousand acres, intended to be set apart for the Six Nations of the New York Indians and the St. Regis tribe; and that an equal quantity to that which is added to the southwestern side shall be taken off from the north-eastern side of the said tract described in that article, on the Oconto creek, to be determined by a commissioner to be appointed by the President of the United States; so that the whole number of acres to be granted to the Six Nations, and St. Regis tribe of Indians, shall not exceed the quantity originally stipulated by the treaty." And whereas, before the treaty aforesaid, *conditionally* ratified, according to the proviso to the resolution of the Senate, above recited, could be obligatory upon the said Menominee nation, their assent to the same must be had and obtained.

And whereas the honorable Lewis Cass, Secretary of the Department of War, by his letter of instructions of the eleventh day of September, A. D. 1832, did authorize and request George B. Porter, Governor of the Territory of Michigan, to proceed to Green Bay, and endeavor to procure the assent of the Menominees to the change proposed by the Senate, as above set forth; urging the necessity of directing his first efforts to an attempt to procure the unconditional assent of the Menominees to the said treaty, as ratified by the Senate. But should he fail in this object that he would then endeavor to procure their assent to the best practicable terms, short of those

proposed by the Senate; giving them to understand that he merely received such proposition as they might make, with a view to transmit it for the consideration of the President and Senate of the United States. And if this course became necessary that it would be very desirable that the New York Indians should also signify their acceptance of the modifications required by the Menominees.

And whereas, in pursuance of the said instructions the said George B. Porter proceeded to Green Bay and having assembled all the chiefs and headmen of the Menominee nation, in council, submitted to them, on the twenty-second day of October A. D. one thousand eight hundred and thirty-two, the said proviso annexed to the resolution aforesaid of the Senate of the United States, for the ratification of the said treaty: and advised and urged on them the propriety of giving their assent to the same. And the said chiefs and headmen having taken time to deliberate and reflect on the proposition so submitted to them, and which they had been urged to assent to, did in the most positive and decided manner, refuse to give their assent to the same. (The many reasons assigned for this determination, by them, being reported in the journal of the said commissioner, which will be transmitted with this agreement.)

And whereas after failing in the object last stated, the said George B. Porter endeavored to procure the assent of the said chiefs and headmen of the Menominee nation to the best practicable terms short of those proposed by the Senate of the United States; and after much labor and pains, entreaty and persuasion, the said Menominees consented to the following, as the modifications which they

would make; and which are reduced to writing, in the form of an agreement, as the best practicable terms which could be obtained from them, short of those proposed by the Senate of the United States, which they had previously positively refused to accede to. And as the modifications so made and desired, have been acceded to by the New York Indians, with a request that the treaty thus modified might be ratified and approved by the President and the Senate of the United States, it is the anxious desire of the Menominees also, that the treaty, with these alterations may be ratified and approved without delay, that they may receive the benefits and advantage secured to them by the several stipulations of the said treaty, of which they have so long been deprived.

The following is the article of agreement made between the said George B. Porter, commissioner on the part of the United States, specially appointed as foresaid, and the said Menominee nation, through their chiefs and headmen on the part of their nation.

First. The said chiefs and headmen of the Menominee nation of Indians do not object to any of the matters contained in the proviso annexed to the resolution of the Senate of the United States, so far as the same relate to the granting of three townships of land on the east side of Winnebago Lake, to the Stockbridge Munsee and Brothertown tribes; to the valuation and payment for their improvements, &c. (ending with the words *"and which lands are to be relinquished by said Indians."*) They therefore assent to the same.

Second. The said chiefs and headmen of the Menominee nation of Indians, objecting to all the matters

contained in the said proviso annexed to the resolution of the Senate of the United States, so far as the same relate to the running of a new line parallel to the south-western boundary line or course of the tract of five hundred thousand acres, described in the first article of the treaty, and set apart for the New York Indians, to commence at a point on the southwestern side of Fox river, and one mile above the Grand Shute, on Fox river, and at a sufficient distance from the said boundary line, as established by the said first article, as shall comprehend the additional quantity of two hundred thousand acres of land, on and along the west side of the Fox river, without including any of the confirmed private land claims, on the Fox river, to compose a part of the five hundred thousand acres intended to be set apart for the Six Nations of the New York Indians and St. Regis tribe, *agree* in lieu of this proposition, to set off a like quantity of two hundred thousand acres as follows: The said Menominee nation hereby agree to cede for the benefit of the New York Indians along the southwestern boundary line of the present five hundred thousand acres described in the first article of the treaty as set apart for the New York Indians, a tract of land; bounded as follows. Beginning on the said treaty line, at the old mill dam on Fox river, and thence extending up along Fox river to the little *Rapid Croche;* from thence running a northwest course three miles; thence on a line running parallel with the several courses of Fox river, and three miles distant from the river, until it will intersect a line, running on a northwest course, commencing at a point one mile above the Grand Shute; thence on a line running northwest, so far as will be necessary to include, between the said last line and the

line described as the southwestern boundary line of the five hundred thousand acres in the treaty aforesaid, the quantity of two hundred thousand acres; and thence running northeast until it will intersect the line, forming the southwestern boundary line aforesaid; and from thence along the said line to the old mill dam, or place of beginning, containing two hundred thousand acres. Excepting and reserving therefrom the *privilege* of Charles A. Grignon, for erecting a mill on Apple creek &c. as approved by the Department of War on the twenty-second day of April one thousand eight hundred and thirty-one and all confirmed private land claims on the Fox river. The lines of the said tract of land so granted to be run, marked and laid off without delay, by a commissioner to be appointed by the President of the United States. And that in exchange for the above, a quantity of land equal to that which is added to the southwestern side shall be taken off from the northeastern side of the said tract, described in that article, on the Oconto creek, to be run, marked and determined by the commissioner to be appointed by the President of the United States, as aforesaid, so that the whole number of acres to be granted to the Six Nations and St. Regis tribe of Indians, shall not exceed the quantity of five hundred thousand acres.

THIRD. The said chiefs and headmen of the Menominee nation agree, that in case the said original treaty, made as aforesaid, and the supplemental articles thereto, be ratified and confirmed at the ensuing session of the Senate of the United States, with the modifications contained in this agreement, that each and every article

thereof shall be as binding and obligatory upon the parties respectively, as if they had been sanctioned at the times originally agreed upon.

In consideration of the above voluntary sacrifices of their interest, made by the said Menominee nation, and as evidence of the good feeling of their great father, the President of the United States, the said George B. Porter commissioner as aforesaid, has delivered to the said chiefs, headmen, and the people of the said Menominee nation here assembled, presents in clothing to the amount of one thousand dollars: five hundred bushels of corn, ten barrels of pork, and ten barrels of flour, &c. &c.

In witness whereof, we have hereunto set our hands and seals, at the Agency House, at Green Bay, this twenty-seventh day of October, in the year of our Lord one thousand eight hundred and thirty-two.

G. B. PORTER,
Commissioner on behalf of the U.S.

Kaush-kau-no-naive,
Grizzly Bear,
Osh-rosh, the Brave,
(by his brother
fully empowered to act.)
Osh-ke-e-na-neur,
the Young Man,
A-ya-mah-ta, Fish Spawn,
Pe-wait-enaw, Rain,
Che-na-po-mee, One that is
Looked at,
Ko-ma-ni-kin, Big Wave,
Ke-shee-a-quo-teur, the
Flying Cloud,
Wain-e-saut,
One who arranges
the circle,
(by his son,
Wa-Kee-che-on-a-peur,)
Ke-shoh, the Sun
(by his son,
A-pa-ma-chao,
Shifting Cloud,)
Ma-concee-wa-be-no-chee,
Bear's Child,
Wa-bose, the Rabbit,
Shaw-e-no-ge-shick,
South Sky,
Ac-ca-mut, the Prophet,
Mas-ka-ma-gee,
Sho-ne-on, Silver,
Maw-baw-so, Pale Color,
Paw-a-ko-neur, Big Soldier,
(by his representative,
Che-kaw-mah-kee-shen.)

Sealed and delivered, in the presence of, George Boyd, U.S. Indian Agent. Charles A. Grignon, Interpreter. Samuel Abbott. Joshua Boyer, Secretary. James M. Boyd. Richard Prickett, Interpreter. Henry S. Baird. R. A. Forsyth, Paymaster U.S.A. B.B. Kercheval. Ebenezer Childs.

To the Indian names are subjoined a mark and seal.

APPENDIX.

To all to whom these presents shall come, the undersigned, Chiefs and Headmen of the sundry tribes of New York Indians, (as set forth in the specifications annexed to their signatures,) send greeting:

Whereas a tedious, perplexing and harassing dispute and controversy have long existed between the Menominee nation of Indians and the New York Indians, more particularly known as the Stockbridge, Munsee and Brothertown tribes, the Six Nations and St. Regis tribe. The treaty made between the said Menominee nation, and the United States, and the conditional ratification thereof by the Senate of the United States, being stated and set forth in the within agreement, entered into between the chiefs and headmen of the said Menominees, and George B. Porter, Governor of Michigan, commissioner specially appointed, with instructions referred to in the said agreement. And whereas the undersigned are satisfied, and believe that the best efforts of the said commissioner were directed and used to procure, if practicable, the unconditional assent of the said Menominees to the change proposed by the Senate of the United States in the ratification of the said treaty: but without success. And whereas the undersigned further believe that the terms stated in the within agreement are the best practicable terms, short of those proposed by the Senate of the United States, which could be obtained from the said Menominees; and being asked to signify our acceptance of the modifications proposed as aforesaid by the Menominees, we are compelled, by a sense of duty and propriety to say that we do hereby accept of the same. So far as the tribes to which we belong are concerned, we are perfectly satisfied, that the treaty should be ratified on the terms proposed by the Menominees. We further believe that the tract of land which the Menominees in the within agreement, are willing to cede, in exchange for an equal quantity on the northeast side of the tract of five

hundred thousand acres, contains a sufficient quantity of good land, favorably and advantageously situated, to answer all the wants of the New York Indians, and St. Regis tribe. For the purpose, then, of putting an end to strife, and that we may all sit down in peace and harmony, we thus signify our acceptance of the modifications proposed by the Menominees: and we most respectfully request that the treaty as now modified by the agreement this day entered into with the Menominees, may be ratified and approved by the President and Senate of the United States.

In witness whereof, we have hereunto set our hands and seals, at the Agency House at Green Bay, this twenty-seventh day of October, in the year of our Lord one thousand eight hundred and thirty-two.

G. B. PORTER,
Commissioner on behalf of the U.S.

For and on behalf of the Stockbridges and Munsees.

John Metoxen,
John W. Quinny,
Austin Quinny,
Jacob Chicks,
Robert Konkopa,
Thos. J. Hendrick,
Benjamin Palmer,
Sampson Medyard,
Capt. Porter,

For, and on behalf of the Brothertowns.

William Dick,
Daniel Dick,
Elcanah Dick.

For, and on behalf of The Six Nations and St. Regis tribe.

Daniel Bread,
John Anthony Brant,
Henry Powles,
Nathaniel Neddy,
Cornelius Stevens,
Thomas Neddy.

Sealed, and delivered, in the presence of George Boyd, U. S. Indian Agent. R. A. Forsyth, Paymaster U. S. A. Charles A. Grignon, Interpreter. Samuel Abbott. Joshua Boyer, Secretary. B. B. Kercheval. Eben. Childs. Henry S. Baird. Peter B. Grignon. Hanson Johnson. James M. Boyd. Richard Pricket, Interpreter.

To the Indian names are subjoined marks.

ARTICLES OF AGREEMENT

Made and concluded at Cedar Point, on Fox river, near Green bay, in the Territory of Wisconsin, this third day of September in the year of our Lord one thousand eight hundred and thirty-six between Henry Dodge, Governor of said Territory of Wisconsin, commissioner on the part of the United States, on the one part; and the chiefs and head men of the Menomonie nation of Indians, of the other part.

ARTICLE FIRST. The said Menomonie nation agree to cede to the United States, all of that tract or district of country included within the following boundaries, viz. Beginning at the mouth of Wolf river, and running up and along the same, to a point on the north branch of said river where it crosses the extreme north or rear line of the five hundred thousand acre tract heretofore granted to the New York Indians: thence following the line last mentioned, in a northeastwardly direction, three miles: thence in a northwardly course, to the upper forks of the Menomonie river, at a point to intersect the boundary line between the Menomonie and Chippewa nation of Indians: thence following the said boundary line last mentioned, in an eastwardly direction as defined and established by the treaty of the Little Bute des Mort, in 1827, to the Smooth Rock or Shos-kin-aubie river: thence down the said river to where it empties into Green bay, between the Little and Great Bay de Noquet: thence up and along the west side of Green bay, (and including all the islands therein, not heretofore ceded) to the mouth of Fox river: thence up and along the said Fox river, and along the west side of Winnebago lake (including the islands therein) to the mouth of Fox river, where it empties into said lake: thence up and along said Fox river to

the place of beginning. (saving and reserving out of the district of country above ceded and described, all that part of the five hundred thousand acre tract, granted by the treaties between the Menomonies and the United States, made on the eighth day of February A. D. 1831, and on the twenty-seventh day of October A. D. 1832, which may be situated within the boundaries hereinbefore described,) the quantity of land contained in the tract hereby ceded, being estimated at about four millions of acres.

And the said Menomonie nation do further agree to cede and relinquish to the United States all that tract or district of country lying upon the Wisconsin river, in said Territory; and included within the following boundaries; viz – Beginning at a point upon said Wisconsin river two miles above the grant or privilege heretofore granted by said nation and the United States, to Amable Grignon; thence running up and along said river forty-eight miles in a direct line: and being three miles in width on each side of said river; this tract to contain eight townships or one hundred and eighty-four thousand three hundred and twenty acres of land.

ARTICLE SECOND. In consideration of the cession of the aforesaid tract of land, the United States agree to pay to the said Menomonie nation, at the lower end of Wah-ne-kun-nah lake in their own country, the sum of twenty-three thousand seven hundred and fifty dollars,* per annum for the term of twenty years.

The United States further agree to pay and deliver to the said Indians, each and every year during the said

term of twenty years, the following articles – Three thousand dollars worth of provisions; two thousand pounds of tobacco; thirty barrels of salt; also the sum of five hundred dollars, per year, during the same term, for the purchase of farming utensils, cattle, or implements of husbandry, to be expended under the direction of the superintendant or agent. Also to appoint and pay two blacksmiths to be located at such places as may be designated by the said superintendant or agent, to erect (and supply with the necessary quantity of iron, steel, and tools) two blacksmith shops; during the same term.

The United States shall also pay the just debts of the said Menomonie Indians, agreeably to the schedule hereunto annexed, amounting to the sum of ninety-nine thousand seven hundred and ten dollars and fifty cents.*

*The sum of one thousand dollars, per annum having been included, by the commissioner in his proposition for the purchase of the above land (which sum was to be applied to the education of the Indian youth;) and the said Indians having declared that they were not desirous of applying that sum to the aforesaid purpose; and that they wished to give that amount to their friend and relation Robert Grignon; for valuable services rendered by him to their nation; therefore the United States do agree to pay to the said Robert Grignon, the sum of one thousand dollars each year during the said term of twenty years.

And whereas the said Indians are desirous of making some provision and allowance to their relatives and friends of mixed blood; the United States do further agree to pay the sum of eighty thousand dollars, to be divided

among all such persons of mixed blood as the chiefs shall hereafter designate: said sum to be apportioned and divided under the direction of a commissioner to be appointed by the President.

ARTICLE THIRD. The said Menomonie nation do agree to release the United States from all such provisions of the treaty of 1831 and 1832, aforesaid, as requires the payment of farmers, blacksmiths, millers &c. They likewise relinquish all their right under said treaty to appropriation for education, and to all improvements made or to be made upon their reservation on Fox river and Winnebago lake; together with the cattle, farming utensils or other articles furnished or to be furnish[ed] to them under said treaty.

ARTICLE 4th. The above annuities shall be paid yearly and every year, during the said term, in the month of June or July, or as soon thereafter as the amount shall be received; and the said Menomonie nation do agree to remove from the country ceded, within one year after the ratification of this treaty:

This treaty shall be binding and obligatory on the contracting parties, as soon as the same shall be ratified by the President and Senate of the United States.

Done at Cedar Point, in said Territory of Wisconsin this third day of September in the year of our Lord one thousand eight hundred and thirty-six, and in the year of the Independence of the United States the sixty-first.

H. DODGE.

Osh-kosh,	Shee-pan-ago,
Aya-ma-taw,	Maw-baw-so,
Ko-ma-ni-kin,	Chin-nay-pay-mawly,
Wain-e-saut,	Chee-chee-go-waw-way,
Kee-sis,	Shoneon,
Carron-Glaude,	Et-chee-kee,
Say-ga-toke,	Pee-a-tum,
Shee-o-ga-tay,	Pay-maw-ba-may,
Wah-pee-min,	Ah-kah-mute,
Isk-ki-ninew,	Pah-mun-a-kut,
Ko-ma-ni-kee-no-shah,	Chee-kah-ma-ke-shir,
Wah-bee-ne-mickee,	Wah-kee-che-un.

Signed and sealed in the presence of Henry S. Baird, Secretary to the Commissioner. George Boyd, United States Indian Agent. Charles A. Grignon, Sworn Interpreter. William Powell, Sworn Interpreter. George M. Brooke, Bt. Brigir. Genl. R. E. Clary, U. S. Army. D. Jones. John P. Arndt. Chas. R. Brush. Louis Philipson. L. Grignon. Agt. Grignon. Samuel Ryan. William Bruce. John Drake. David Blish, jr. J. Jourdain. T. T. Porlier.

To the Indian names are subjoined marks.

Schedule.

It is agreed on the part of the United States, that the following claims shall be allowed and paid, agreeably to the second article of the foregoing treaty, viz:

To John Lawe, twelve thousand five hundred dollars;
Augustine Grignon ten thousand dollars;
William Powell and Robert Grignon four thousand two hundred and fifty dollars;
Charles A. Grignon ten thousand dollars;
Jophn Lawe & Co., six thousand dollars;

Walter T. Webster one hundred dollars;
John P. Arndt five hundred and fifty dollars;
William Farnsworth and Charles R. Brush two thousand five hundred dollars;
James Porlier, seven thousand five hundred dollars;
Heirs of Louis Beaupre one thousand five hundred dollars;
Dominick Brunette two hundred and thirty-one dollars and fifty cents;
Alexander J. Irwin, one thousand two hundred and fifty dollars;
American Fur Co. (western outfit) four hundred dollars;
Charles Grignon one thousand two hundred dollars;
Joseph Rolette one thousand seven hundred and fifty dollars;
Charles A. and Alexander Grignon seven hundred and fifty dollars;
James Reed seven hundred dollars;
Peter Powell one thousand seven hundred and fifty dollars;
Paul Grignon five thousand five hundred dollars;
William Dickinson three thousand dollars;
Robert M. Eberts seventy-four dollars;
Joseph Jourdain fifty dollars;
James Knaggs five hundred and fifty dollars ($550;)
Ebenezer Childs two hundred dollars;
Lewis Rouse five thousand dollars;
William Farnsworth two thousand five hundred dollars;
Saml. Irwin & Geo. Boyd jr. one hundred and five dollars;

Aneyas Grignon two thousand five hundred dollars;
Pierre Grignon decd. by Rob. & Peter B. Grignon six thousand dollars;
Stanislius Chappue one hundred dollars;
John Lawe one thousand two hundred dollars;
William Dickinson two hundred and fifty dollars;
Stanislius Chappue two thousand five hundred dollars;
Lewis Grignon seven thousand two hundred and fifty dollars.

H. DODGE, *Commissioner.*

All the above accts were sworn to before me the 3d day of September 1836.

JOHN P. ARNDT,
A Justice of the Peace.

[NOTE. – This treaty was ratified with the following amendments thereto, as expressed in the aforesaid resolution of the Senate:

After the word "country" in line 4 of article 2d strike out the words "the sum of twenty-three thousand seven hundred and fifty," and insert the following words in lieu thereof – or at such other place as may be designated by the President of the United States, the sum of twenty thousand.

After the word "cents," at the end of the third paragraph of the second article, insert the following words. *Provided, always,* That no part or portion of said debts shall be paid until the validity and justice of each of them, shall have been inquired into by the Superintendent of Indian Affairs, who shall in no instance increase

the amount specified in said schedule, but who shall allow the sum specified, reject it entirely, or reduce it as upon examination and proof may appear just, and if any part of said sum is left after paying said debts so adjudged to be just, then such surplus shall be paid to the said Indians for their own use.

Strike out the fourth paragraph of the second article in the following words: "The sum of one thousand dollars per annum having been included by the commissioner, in his proposition for the purchase of the above land (which sum was applied to the education of the Indian youth) and the said Indians having declared that they were not desirous of applying that sum to the aforesaid purpose, and that they wished to give that amount to their friend and relation Robert Grignon, for valuable services rendered by him to their nation, therefore, the United States do agree to pay to the said Robert Grignon the sum of one thousand dollars, each year, during the said term of twenty years."

At the end of the second article insert the following proviso: *Provided, always,* That no person shall be entitled to any part of said fund, unless he is of Indian descent and actually resident within the boundaries described in the first article of this treaty, nor shall any thing be allowed to any such person who may have received any allowance under any previous treaty. The portions of this fund allowed by the commissioner to those half-breeds who are orphans, or poor or incompetent to make a proper use thereof, shall be paid to them in installments or otherwise as the President may direct.

At the end of the third article insert the following words: And in consideration of said release and relinquishment, the United States stipulate and agree that the sum of seventy-six thousand dollars shall be allowed to the said Indians, and this sum shall be invested in some safe stock and the interest thereof as it accrues shall also be so vested until such time as in the judgment of the President, the income of the aggregate sum can be usefully applied to the execution of the provisions in the said fourth article, or to some other purposes beneficial to the said Indians.]

TREATY WITH THE MENOMONEE TRIBE OF INDIANS.

OCT. 18, 1848.

Articles of a Treaty made and concluded at Lake Pow-aw-hay-kon-nay, in the State of Wisconsin, on the eighteenth Day of October, one thousand eight hundred and forty-eight, between the United States of America, by William Medill, a Commissioner duly appointed for that purpose, and the Menomonee Tribe of Indians, by the Chiefs, Headmen, and Warriors of said Tribe.

ARTICLE I.

It is stipulated and solemnly agreed that the peace and friendship now so happily subsisting between the government and people of the United States and the Menomonee Indians shall be perpetual.

ARTICLE II.

The said Menomonee tribe of Indians agree to cede, and do hereby cede, sell, and relinquish to the United States all their lands in the State of Wisconsin wherever situated.

ARTICLE III.

In consideration of the foregoing cession, the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indians' lands are held, all that country or tract of land ceded to the said United States by the Chippewa Indians of the Mississippi and Lake Superior, in the treaty of August 2, 1847, and the Pillager band

of Chippewa Indians, in the treaty of August 21, 1847, which may not be assigned to the Winnebago Indians, under the treaty with that tribe of October 13, 1846, and which is guarantied to contain not less than six hundred thousand acres.

ARTICLE IV.

In further and full consideration of said cession, the United States agree to pay the sum of three hundred and fifty thousand dollars, at the several times, in the manner and for the purposes following, viz.:

To the chiefs, as soon after the same shall be appropriated by Congress as may be convenient to enable them to arrange and settle the affairs of their tribe preparatory to their removal to the country set apart for and given to them as above, thirty thousand dollars.

To such persons of mixed blood, and in such proportion to each, as the chiefs in council, and a commissioner to be appointed by the President, shall designate and determine, and as soon after the appropriation thereof as may be found practicable and expedient, forty thousand dollars.

In such manner and at such times as the President shall prescribe, in consideration of their removing themselves, which they agree to do, without further cost or expense to the United States, twenty thousand dollars.

In such manner and at such times as the President shall prescribe, in consideration of their subsisting themselves the first year after their removal, which they agree

to do, without further cost or expense on the part of the United States, twenty thousand dollars.

To be laid out and applied, under the direction of the President, in the establishment of a manual labor school, the erection of a grist and saw mill, and other necessary improvements in their new country, fifteen thousand dollars.

To be laid out and applied, under the direction of the President, in procuring a suitable person, to attend and carry on the said grist and saw mill for a period of fifteen years, nine thousand dollars.

To be laid out and applied, under the direction of the President, in continuing and keeping up a blacksmith's shop, and providing the usual quantity of iron and steel for the use and benefit of said tribe, for a period of twelve years, commencing with the year one thousand eight hundred and fifty-seven, and when all provision for blacksmiths' shops under the treaty of 1836 shall cease, eleven thousand dollars.

To be set apart, applied, and distributed under the direction of the President, in payment of individual improvements of the tribe upon the lands above ceded to the United States, five thousand dollars.

And the balance, amounting to the sum of two hundred thousand dollars, to be paid over to the tribe, as Indian annuities are required to be paid, in ten equal annual instalments, commencing with the year one thousand eight hundred and fifty-seven, and when their annuities or annual instalments under the treaty of 1836 shall have ceased.

ARTICLE V.

It is stipulated and agreed, that the sum now invested in stocks, under the Senate's amendment to the treaty of 1836, with the interest due thereon at this time, shall be and remain invested, under the direction of the President, and that the interest hereafter arising therefrom shall be disposed of as follows: that is to say, so much thereof as may be necessary to the support and maintenance of the said manual labor school, and other means of education, and the balance be annually paid over in money as other annuities, or applied for the benefit and improvement of said tribe, as the President, on consultation with the chiefs, may, from time to time, determine.

ARTICLE VI.

To enable the said Indians to explore and examine their new country, and as an inducement to an early removal thereto, it is agreed that the United States will pay the necessary expenses of a suitable delegation to be selected for that purpose, under the direction of the President.

ARTICLE VII.

It is alleged that there were less goods delivered to the said Indians at the annuity payment of 1837 than were due and required to be paid and delivered to them under the stipulations of their treaties with the United States then in force; and it is therefore agreed that the subject shall be properly investigated, and that full

indemnity shall be made to them for any loss which they may be shown to have sustained.

ARTICLE VIII.

It is agreed that the said Indians shall be permitted, if they desire to do so, to remain on the lands hereby ceded for and during the period of two years from the date hereof, and until the President shall notify them that the same are wanted.

ARTICLE IX.

It is stipulated that Robert Grignon, who has erected a saw mill upon the Little Wolf River, at his own expense, for the benefit and at the request of said Indians, shall have the right of a preëmptor to the lands upon which such improvements are situated, not exceeding in quantity on both sides of said river one hundred and sixty acres.

ARTICLE X.

This treaty to be binding on the contracting parties as soon as it is ratified by the President and Senate of the United States.

In testimony whereof, the said William Medill, Commissioner as aforesaid, and the chiefs, headmen, and warriors of the said Menomonee tribe of Indians, have hereunto set their hands and seals, at the place and on the day and year aforesaid.

W. MEDILL, [SEAL.]
Commissioner on the Part of the United States.

Signed and sealed in the presence of us, –

Albert G. Ellis, *Sub-Agent,*
Chas. A. Grignon, *U.S. Interpreter,*
F. J. Bonduel, *Missionary Priest among the Menomonee Indians.*
M. L. Martin,
P. B. Grignon,
Samuel Ryan,
A. G. Grignon,
John B. Jacobs.

Osh-Kush,
Jau-ma-tau,
Waw-kee-che-un,
Sage-toke,
Wy-tah-sauh,
Kee-chee-new,
Chee-cheequon-away,
Corron Glaude,
Sho-nee-nieu,
Lamotte,
Che-quo-tum,
Shaw-wan-on,
Ah-ko-no-may,
Shaw-poa-tuk,
Wau-po-nan-ah,
Sho-na-new, Jr.,
Pah-maw-po-may,
Naw-kaw-chis-ka,
Show-anno-penessee,
Tah-ke,
Osh-kish-he-nay-new,
Little Wave,
Muck-atah-penesse,
Wa-pee-men-shaw,
Ah-ke-na-pe-new,
Ah-kaw-mut,
Kee-she-teu-ke-tau,
She-pau-na-ko,
Naw-kaw-nish-kau-wa.

[To each of the names of the Indians is affixed his mark.]

Witnesses –

William Powell,
John B. Dube,
John G. Kittson,
Robt. Grignon,
Charles Caron,
Antoine Gotheiu,
F. Desnoyers,
Louis G. Porhir,
O. W. F. Bruce.

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, a treaty was made and concluded at the Falls of Wolf River, in the State of Wisconsin, on the twelfth day of May, one thousand eight hundred and fifty-four, between the United States of America, by Francis Huebschmann, Superintendent of Indian Affairs, duly authorized thereto, and the Menomonee tribe of Indians, by the chiefs, headmen, and warriors of said tribe – such articles being supplementary and amendatory to the treaty made between the United States and said tribe on the eighteenth day of October, one thousand eight hundred and forty-eight; which treaty is in the words following, to wit: –

Articles of agreement, made and concluded at the Falls of Wolf River, in the State of Wisconsin, on the twelfth day of May, one thousand eight hundred and fifty-four, between the United States of America, by Francis Huebschmann, Superintendent of Indian Affairs, duly authorized thereto, and the Menomonee tribe of Indians, by the chiefs, headmen, and warriors of said tribe – such articles being supplementary and amendatory to the treaty made between the United States and said tribe on the eighteenth day of October, one thousand eight hundred and forty-eight.

Whereas, among other provisions contained in the treaty in the caption mentioned, it is stipulated that for and in consideration of all the lands owned by the Menomonees, in the State of Wisconsin, wherever situated,

the United States should give them all that country or tract of land ceded by the Chippewa Indians of the Mississippi and Lake Superior, in the treaty of the second of August, eighteen hundred and forty-seven, and by the Pillager band of Chippewa Indians in the treaty of the twenty-first of August, eighteen hundred and forty-seven, which had not been assigned to the Winnebagoes – guarantied not to contain less than six hundred thousand acres; should pay them forty thousand dollars for removing and subsisting themselves; should give them fifteen thousand dollars for the establishment of a manual labor school, the erection of a grist and saw mill, and for other necessary improvements in their new country; should cause to be laid out and expended in the hire of a miller, for the period of fifteen years, nine thousand dollars; and for continuing and keeping up a blacksmith shop and providing iron and steel for twelve years, commencing on the first of January, eighteen hundred and fifty-seven, eleven thousand dollars.

And whereas, upon manifestation of great unwillingness on the part of said Indians to remove to the country west of the Mississippi River, upon Crow Wing, which had been assigned them, and a desire to remain in the State of Wisconsin, the President consented to their locating temporarily upon the Wolf and Oconto Rivers.

Now, therefore, to render practicable the stipulated payments herein recited, and to make exchange of the lands given west of the Mississippi for those desired by the tribe, and for the purpose of giving them the same for a permanent home, these articles are entered into.

ARTICLE 1. The said Menomonee tribe agree to cede, and do hereby cede, sell, and relinquish to the United States, all the lands assigned to them under the treaty of the eighteenth of October, eighteen hundred and forty-eight.

ARTICLE 2. In consideration of the foregoing cession the United States agree to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held, that tract of country lying upon the Wolf River, in the State of Wisconsin, commencing at the southeast corner of township 28 north of range 16 east of the fourth principal meridian, running west twenty-four miles, thence north eighteen miles, thence east twenty-four miles, thence south eighteen miles, to the place of beginning – the same being townships 28, 29, and 30, of ranges 13, 14, 15, and 16, according to the public surveys.

ARTICLE 3. The United States agree to pay, to be laid out and applied under the direction of the President, at the said location, in the establishment of a manual labor school, the erection of a grist and saw mill, and other necessary improvements, fifteen thousand dollars; in procuring a suitable person to attend and carry on the said grist and saw mill, for a period of fifteen years, nine thousand dollars, in continuing and keeping up a blacksmith shop, and providing the usual quantity of iron and steel for the use of said tribe, for a period of twelve years, commencing with the year eighteen hundred and fifty-seven, eleven thousand dollars; and the United States further agree to pay the said tribe, to be applied under the direction of the President, in such manner and at such times as he may deem advisable, for such purposes and

uses as in his judgment will best promote the improvement of the Menomonees, the forty thousand dollars stipulated to be applied to their removal and subsistence west of the Mississippi. It being understood that all other beneficial stipulations in said treaty of 1848 are to be fulfilled as therein provided.

ARTICLE 4. In consideration of the difference in extent between the lands hereby ceded to the United States, and the lands given in exchange, and for and in consideration of the provisions hereinbefore recited, and of the relinquishment by said tribe of all claims set up by or for them, for the difference in quantity of lands supposed by them to have been ceded in the treaty of eighteenth of October, eighteen hundred and forty-eight, and what was actually ceded, the United States agree to pay said tribe the sum of one hundred and fifty thousand dollars,* in fifteen annual instalments, commencing with the year 1867; each instalment to be paid out and expended under the direction of the President of the United States, and for such objects, uses, and purposes, as he shall judge necessary and proper for their wants, improvement, and civilization.

ARTICLE 5. It is further agreed that all expense incurred in negotiating this treaty shall be paid by the United States.

ARTICLE 6. This treaty to be binding on the contracting parties as soon as it is ratified by the President and Senate of the United States.†

---

* See amendment, *post*, p. 1067.

† See amendment, *post*, p. 1067.

In testimony whereof, the said Erancis Huebschmann, superintendent as aforesaid, and the chiefs, headmen, and warriors of the said Menomonee tribe, have hereunto set their hands and seals, at the place and on the day and year aforesaid.

FRANCIS HUEBSCHMANN, [L. S.]

Superintendent of Indian Affairs.

WAU-KE-CHON, his x mark. [L. S.]
WIS-KE-NO, his x mark. [L. S.]
WAY-TAN-SAH, his x mark. [L. S.]
CARRON, his x mark. [L. S.]
SHO-NE-NIEW, his x mark. [L. S.]
LAMOTTE, his x mark. [L. S.]
PE-QUO-QUON-AH, his x mark. [L. S.]
SHAW-POA-TUK, his x mark. [L. S.]
WAU-PEN-NA-NOSH, his x mark. [L. S.]
SHO-NE-ON, his x mark. [L. S.]
SHAW-WAN-NA-PENASSE, his x mark. [L. S.]
TA-KO, his x mark. [L. S.]
KO-MAN-NE-KIN-NO-SHAH, his x mark. [L. S.]
WAU-PA-MAH-SHAEW, his x mark. [L. S.]
AUCK-KA-NA-PA-WAEW, his x mark. [L. S.]
AH-WAY-SHA-SHAH, his x mark. [L. S.]
CHECH-E-QUON-O-WAY, his x mark. [L. S.]
NAH-PONE, his x mark. [L. S.]
MO-SHA-HAT, his x mark. [L. S.]
I-YAW-SHIEW, his x mark. [L. S.]
KAH WAY-SOT, his x mark. [L. S.]

Signed and sealed in the presence of us:

JOHN V. SUYDAM, *Sub-Agent,*
CHAS. A. GRIGNON, *U. S. Interpreter,*
H. W. JONES, *Secretary to the Commissioner,*
CHAS. H. WHITE, *Deputy U. S. Marshal,*

HEMAN M. CADY, *U. S. Timber Agent,*
WILLIAM POWELL,
JOHN WILEY,
H. L. MURRAY.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the second day of August, one thousand eight hundred and fifty-four, advise and consent to the ratification of its articles and amendments, by a resolution in the words following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

August, 2, 1854.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement, made and concluded at the Falls of Wolf River, in the State of Wisconsin, on the twelfth day of May, one thousand eight hundred and fifty-four, between the United States of America, by Francis Huebschmann, Superintendent of Indian Affairs, duly authorized thereto, and the Menomonee tribe of Indians, by the chiefs, headmen, and warriors of said tribe, such articles being supplementary and amendatory to the treaty made between the United States and said tribe, on the eighteenth day of October, one thousand eight hundred and forty-eight; with the following

AMENDMENTS.

ARTICLE 4. Strike out the words, "one hundred and fifty thousand," and insert in lieu thereof the words: *two hundred and forty-two thousand six hundred and eighty-six.*

ARTICLE 6. Insert at the end thereof the following: *and assented to by Osh-Kosh and Ke-she-nah, chiefs of said tribes.*

Attest: ASBURY DICKINS, *Secretary.*

We, the chiefs, headmen, and warriors of the Menomonee tribe of Indians, parties to the articles of agreement made and concluded at the Falls of Wolf River, in the State of Wisconsin, on the twelfth day of May, one thousand eight hundred and fifty-four, between the United States of America, by Francis Huebschmann, Superintendent of Indian Affairs, duly authorized thereto, and the Menomonee tribe of Indians, by the chiefs, headmen, and warriors of said tribe, such articles being supplementary and amendatory to the treaty of eighteenth October, 1848; having had the amendments made by the Senate of the United States on the second day of August, A. D. 1854, fully explained to us in general counsel assembled, which amendments are in the following words, viz:

AMENDMENTS:

ARTICLE 4. Strike out the words "one hundred and fifty thousand," and insert in lieu thereof the words: *two hundred and forty-two thousand six hundred and eighty-six.*

ARTICLE 6. Insert at the end thereof the following: *and assented to by Osh-kosh and Ke-she-nah, chiefs of said tribe* – to hereby accept and consent to the said amendments to the articles of agreement aforesaid, and agree that the same shall be considered as a part thereof; and we, the said Osh-kosh and Ke-she-nah, having had the

said articles and amendments fully explained to us, do hereby assent, accept, and agree to the same.

In testimony whereof, we have hereunto set our hands and affixed our seals, this 22d day of August, A. D. 1854.

OSH-KOSH, his x mark.	[L. S.]
KE-SHE-NAH, his x mark.	[L. S.]
LAMOTTE, his x mark.	[L. S.]
WAU-KE-CHON, his x mark.	[L. S.]
WAY-TAN-SAH, his x mark.	[L. S.]
CARRAN, his x mark.	[L. S.]
SHO-NE-NIEW, his x mark.	[L. S.]
PE-QUO-QUON-NAH, his x mark.	[L. S.]
SHAW-POA-TUCK, his x mark.	[L. S.]
WAU-PEN-NA-NOSH, his x mark.	[L. S.]
SHO-NE-ON, his x mark.	[L. S.]
SHA-WAN-NA-PENASSE, his x mark.	[L. S.]
TA-KO, his x mark.	[L. S.]
KO-MAN-NE-KIN-NO-SHAH, his x mark.	[L. S.]
WAU-PA-MAH-SHAEW, his x mark.	[L. S.]
AUK-KA-NA-PA-WAEW, his x mark.	[L. S.]
AH-WA-SHA-SHAH, his x mark.	[L. S.]
CHECH-E-QUON-O-WAY, his x mark.	[L. S.]
NAH-PONE, his x mark.	[L. S.]
MO-SHA-SHAT, his x mark.	[L. S.]
I-YAW-SHIEW, his x mark.	[L. S.]
KAH-WAY-SOT, his x mark.	[L. S.]
MIS-KE-E-NA-NIEW, his x mark.	[L. S.]
I-AM-A-TAH, his x mark.	[L. S.]
WIS-KE-NO, his x mark.	[L. S.]

Signed in presence of

JOHN V. SUYDAM, *Sub-Agent,*
CHAS. A. GRIGNON, *U. S. Interpreter,*
WILLIAM POWELL,
F. DESNOYERS,

E. D. GUSNAER,
HENRY C. SCOTT,
R. A. JONES,
JOHN WILEY.

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advise and consent of the Senate, as expressed in their resolution of the second day of August, one thousand eight hundred and fifty-four, accept, ratify, and confirm the said treaty, and the amendments thereto.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

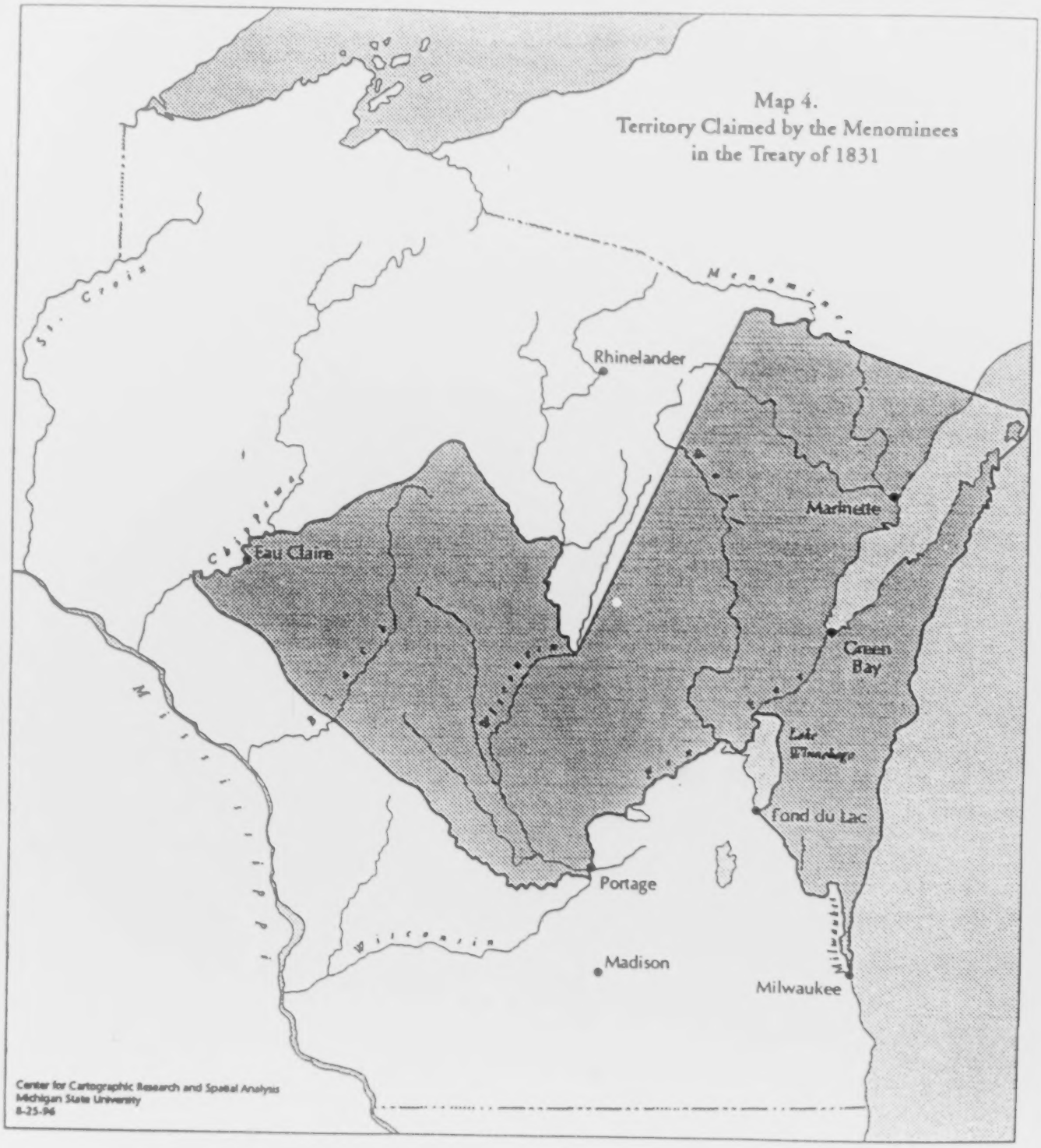
Done at the city of Washington, this second day of August, in [L. S.] the year of our Lord eighteen hundred and fifty-four, and of the Independence of the United States the seventy-ninth.

FRANKLIN PIERCE.

BY THE PRESIDENT:

W. L. MARCY, *Secretary of State.*

Map 4.
Territory Claimed by the Menominees
in the Treaty of 1831



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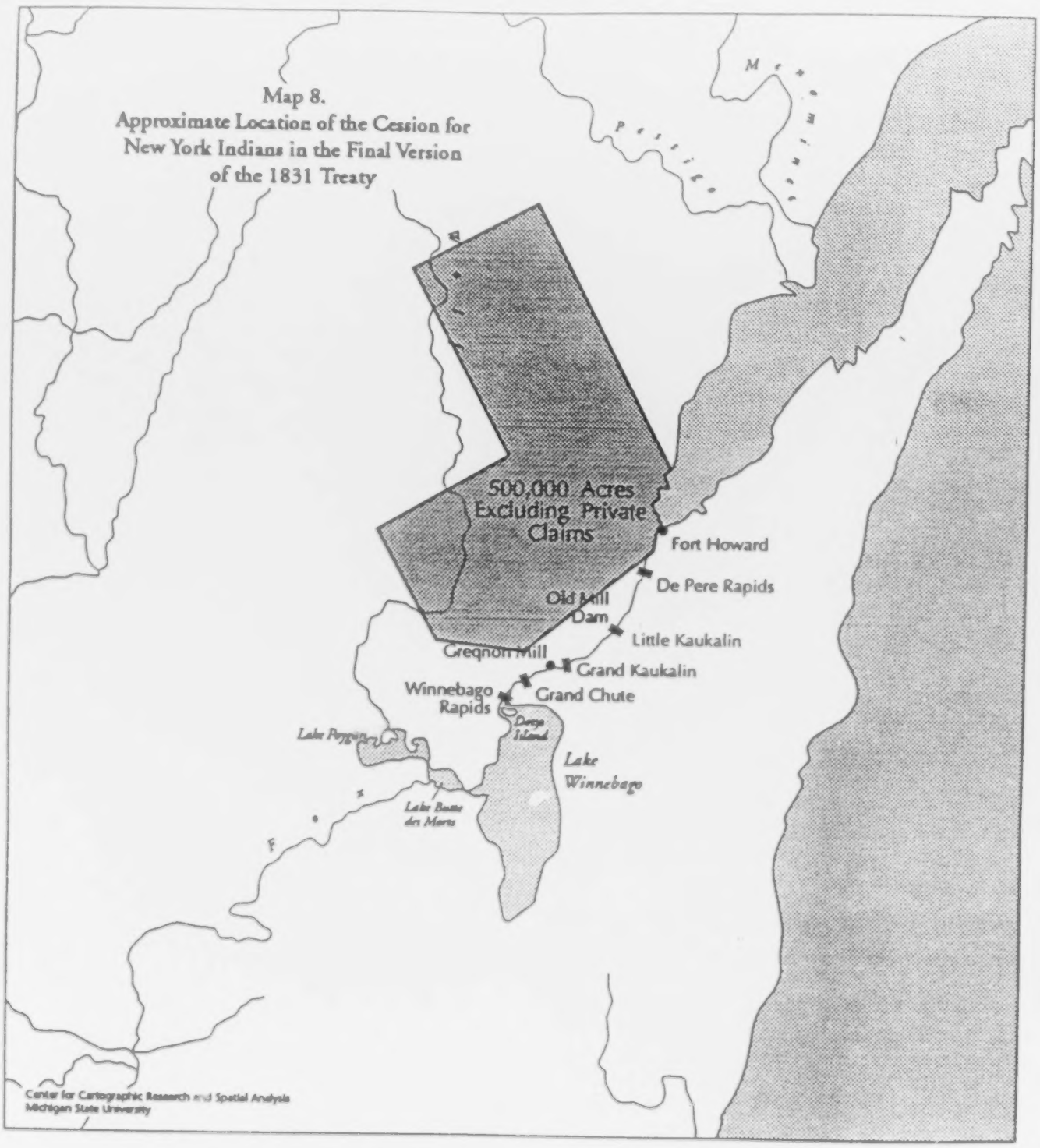
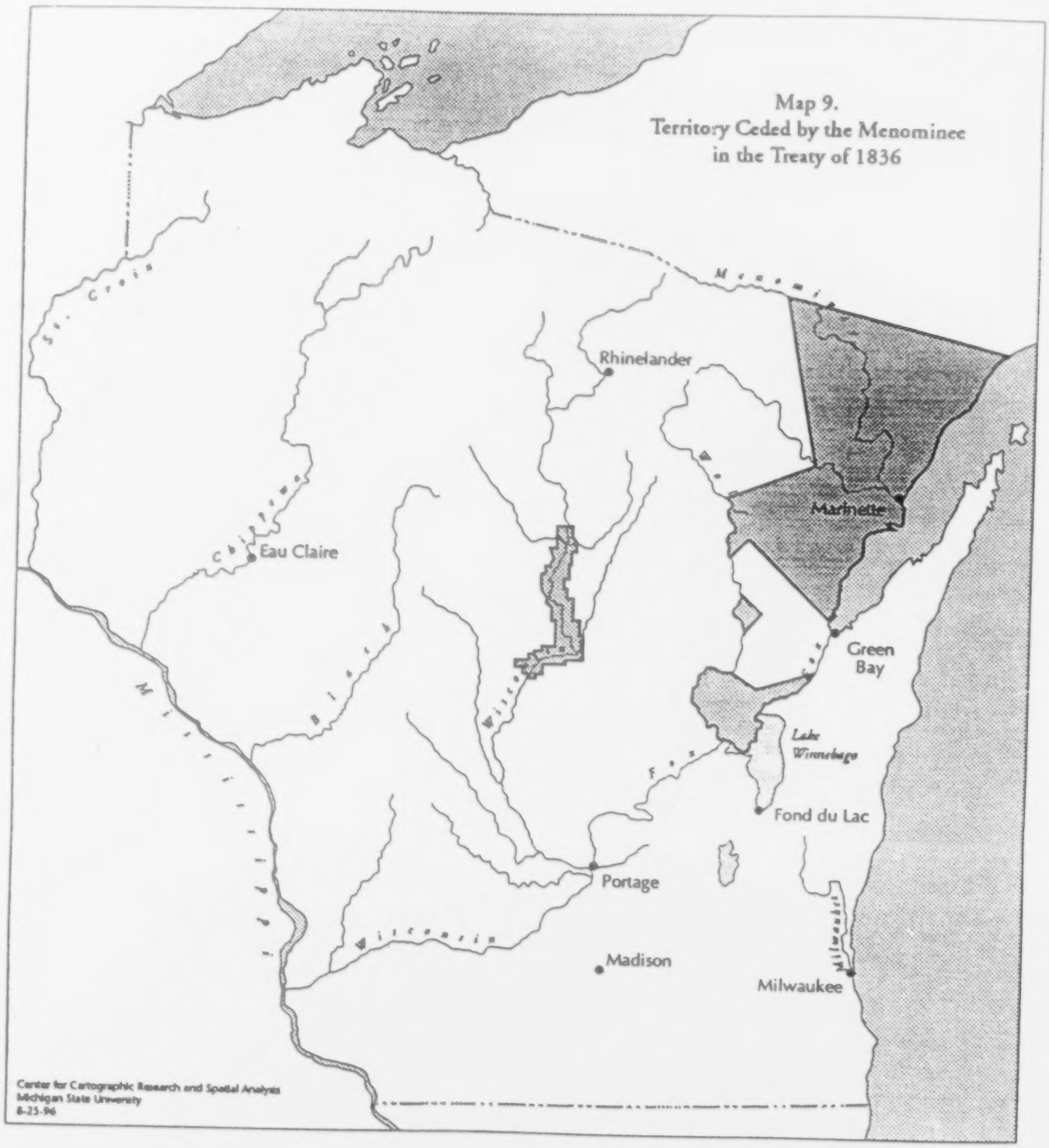
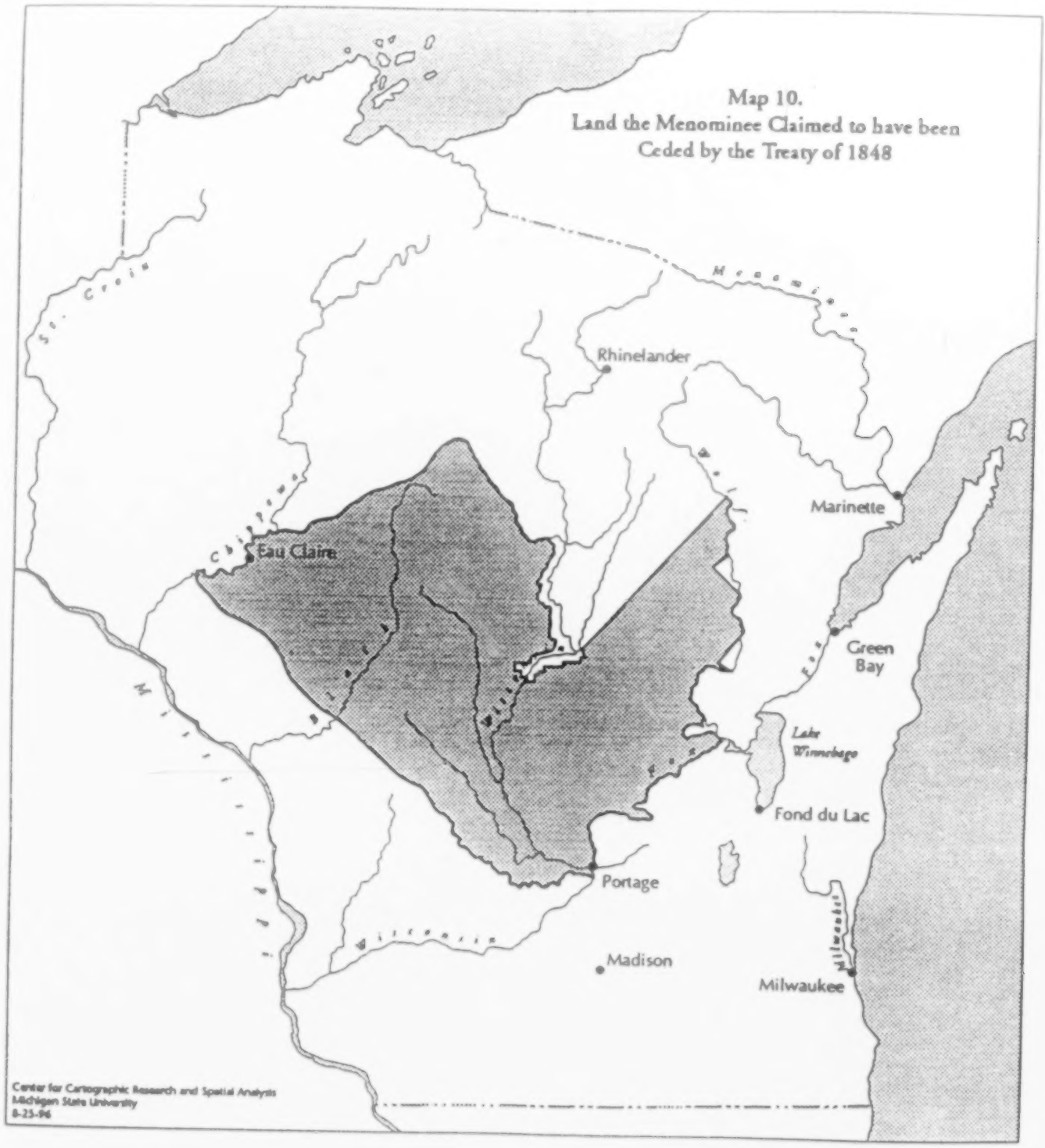
Map 6.
Territory Ceded by the Menominee
in the Treaty of 1831

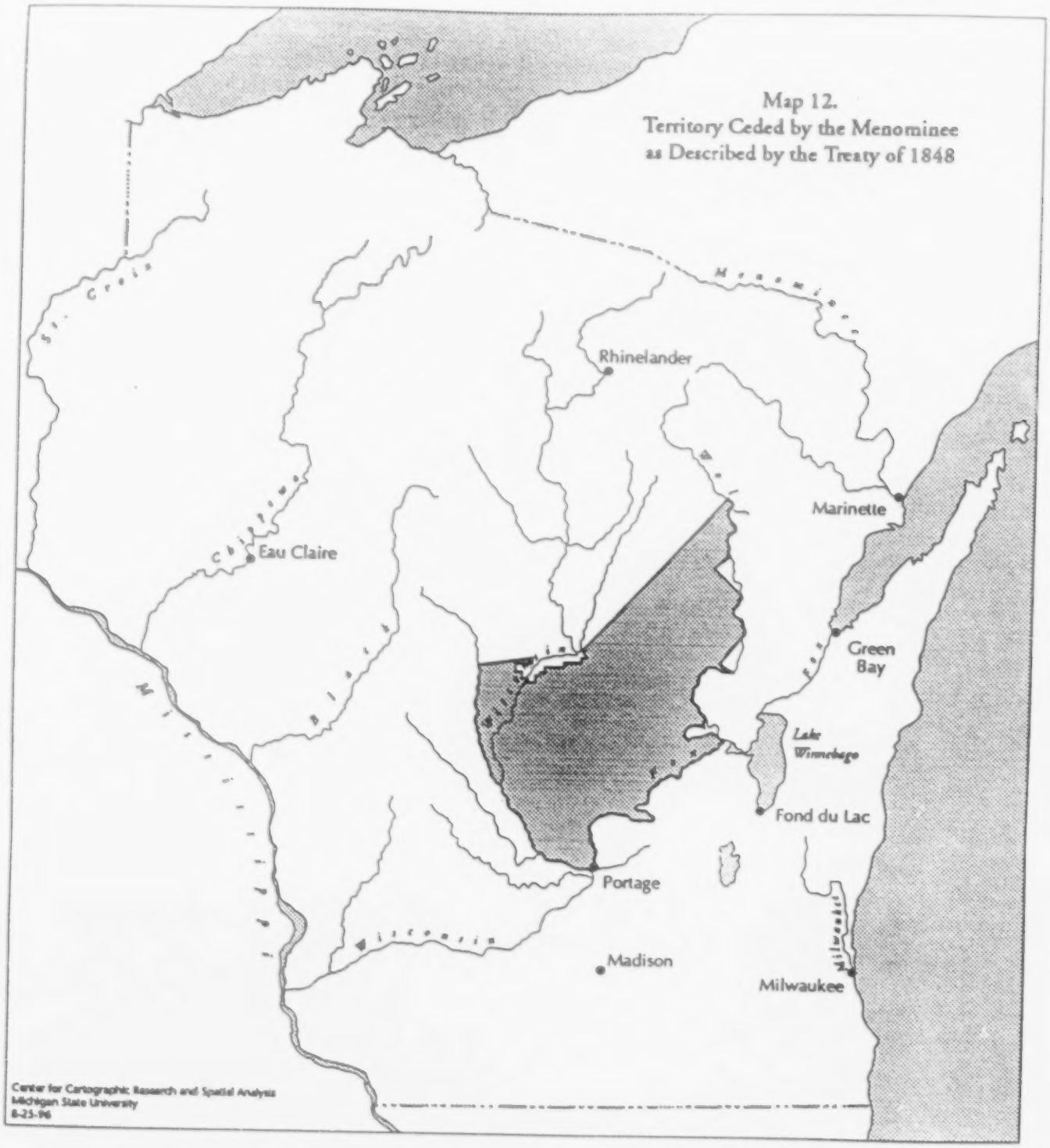
Map 8.
Approximate Location of the Cession for New York Indians in the Final Version of the 1831 Treaty




Map 9.
Territory Ceded by the Menominee
in the Treaty of 1836
St. Croix
Menominee
Rhinelander
Chippewa
Eau Claire
Marinette
Green
Bay
Lake
Winnebago
Fond du Lac
Portage
Madison
Milwaukee
Center for Cartographic Research and Spatial Analysis
Michigan State University
8-25-96


Map 10.
Land the Menominee Claimed to have been
Ceded by the Treaty of 1848
St. Croix
Menominee
Rhinelander
Chippewa
Eau Claire
Marinette
Green
Bay
Fox
Lake
Winnebago
Fond du Lac
Portage
Wisconsin
Madison
Milwaukee
Milwaukee
Center for Cartographic Research and Spatial Analysis
Michigan State University
8-25-96

Map 12.
Territory Ceded by the Menominee
as Described by the Treaty of 1848



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Supreme Court, U.S.
FILED
MAR 17 1999
OFFICE OF THE CLERK

No. 98-1306

In The

Supreme Court of the United States

October Term, 1998

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Petitioner,

v.

TOMMY G. THOMPSON, Governor of the State of Wisconsin; GEORGE E. MEYER, Secretary, Wisconsin Department of Natural Resources; JAMES T. ADDIS, Administrator, DNR Division of Resource Management; JOHN E. FRYATT, Administrator, DNR Division of Enforcement; HERBERT F. BEHNKE, TRYGBE A. SOLBERG, NEAL W. SCHNEIDER, BETTY JO NELSEN, MARY JANE NELSON, JAMES E. TIEFENTHALER, JR., and STEPHEN D. WILLETT, Members, Wisconsin Natural Resources Board,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION

JAMES E. DOYLE
Attorney General

CHARLES D. HOORNSTRA
Assistant Attorneys General
State Bar No. 1010601
Counsel of Record

THOMAS DOSCH
JOHN NIEMISTO
PHILIP PETERSON
Assistant Attorneys General

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9945

QUESTIONS PRESENTED

1. Does the alleged "Indian understanding" override plain treaty language?

2. In an 1831 treaty with the United States, the Menominee Indian Tribe retained title to lands west of the Fox River and reserved the area "for a hunting ground, until the President of the United States, shall deem it expedient to extinguish their title" to these lands. The tribe also "promise[d] to surrender it immediately" when notified of the government's desire to possess it. Were the tribe's special hunting rights thereafter extinguished as a matter of law when the tribe conveyed title to these lands to the United States through subsequent treaties?

3. In the alternative, were the tribe's special hunting rights on these lands extinguished as a matter of law (a) when the tribe entered into subsequent treaties requiring their removal from the lands and their relocation to Minnesota, or (b) when Wisconsin attained statehood in 1848?

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Respondents respectfully submit this brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

Petitioner commenced this action in January 1995 to enjoin state of Wisconsin officials (hereafter "state") from interfering with claimed aboriginal and treaty-based usufructuary rights. R.2. The complaint advanced six different claims, but the tribe here abandons all but one -- the claimed hunting right west of the Fox River in Wisconsin under the 1831 treaty.[1]

There were four treaties between the tribe and the government in 1831, 1836,[2] 1848,[3] and 1854.[4] Only the 1831 treaty reserved usufructuary rights. It distinguished between lands east of the Fox River and lands west of the Fox River. On the east, title was conveyed to the United States but the right to hunt and fish was preserved until the lands were "surveyed and offered for sale by the President; they conducting themselves peaceably and orderly." App. 170. As the tribe conceded, these lands were surveyed and offered for sale by 1834. App. 4, 20-21, 151. On the west, the hunting right was to remain "until the President of the United States, shall deem it expedient to extinguish their title." App. 171. When notified of the government's "desire ... to possess it," the "tribe promise[d] to surrender it[5]

---

[1]February 8, 1831, 7 Stat. 342; supplemented February 27, 1831, 7 Stat. 346; amended October 27, 1832, 7 Stat. 405.

[2]September 3, 1836, 7 Stat. 506.

[3]October 18, 1848, 9 Stat. 952.

[4]May 12, 1854, 10 Stat. 1064.

[5]The tribe's appendix inadvertently omits the word "it".

immediately." Id. In 1836 the tribe ceded lands immediately west of the Fox, and in 1848 it ceded all remaining Wisconsin lands "wherever situated."[6]

In addition to ceding lands, in the 1836 treaty the Menominee agreed to remove from the portion ceded.[7] Likewise in the 1848 treaty, having ceded all Wisconsin lands, the Menominee agreed to remove to the Minnesota reservation conveyed to it by that treaty.[8] But they were permitted "to remain on the lands hereby ceded for and during the period of two years ... and until the President shall notify them that the same are wanted." Article VIII; App. 203.

The Menominee complaint did not mention the 1848 treaty. When the state officials cited its terms of cession and obligatory removal, the Menominee argued that treaty was the product of fraud[9] and that it had been nullified by the 1854 treaty. App. 60-61. The courts below, however, read all four treaties together. The district court said, "Each treaty built upon its predecessor by continuing forward the obligations undertaken in the previous agreements." App. 65.

---

[6]Under the 1836 treaty, Article First, the Menominee "cede[d] to the United States, all of that tract or district of country" west of the Fox River described in that article. App. 190. Under the 1848 treaty, Article II, the Menominee "agree to cede, and do hereby cede, sell, and relinquish to the United States all their lands in the State of Wisconsin wherever situated." App. 199..

[7]The 1836 treaty, Article Fourth, provided that "the said Menomonie nation do agree to remove from the country ceded, within one year after the ratification of this treaty." App. 193.

[8]Article IV gave the Menominee benefits "preparatory to their removal to the country set apart for and given to them" and "in consideration of their removing themselves, which they agree to do." App. 200. The new reservation was some 300 miles away. App. 18. See the district court's extensive discussion, App. 127-30, 155-56.

[9]There is no basis for the tribe's puzzlement here as to why the courts below thought it argued the 1848 treaty was a product of fraud. See its district court brief, R.25, at 17, 19, 41, 42, 44. Also see its Seventh Circuit brief at 32; but see 30 n.17 (asserting its references to fraud were not intended to argue for invalidation of the 1848 treaty).

The court of appeals noted that "courts must construe successive treaties in conjunction with the language of earlier treaties." App. 16 (citations omitted).

The 1854 treaty itself explains what happened after the 1848 treaty. The Menominee did not want to go to Minnesota. See Preamble ("upon manifestation of great unwillingness ... to remove ... and a desire to remain in the State of Wisconsin"). App. 206. So, "the President consented to their locating temporarily upon the Wolf and Oconto Rivers," id., and the 1854 treaty was to be "supplementary and amendatory" to the 1848 treaty. Preamble, App. 205. The Menominee retroceded the Minnesota reservation to the government. Article 1, App. 207. The government gave the Menominee a Wisconsin reservation lying on the Wolf River as well as other enhanced benefits. App. 207-08, esp. Article II.

The state moved to dismiss for failure to state a claim because the treaties on their face showed that the temporary usufructuary rights were title-dependent and that the tribe had given up title. At first the district court dismissed only one of the six claims, but admitted it was a "close question" whether the plain treaty language could support the tribe's use right claims. App. 47. The tribe "has not explained how it can show that the apparently clear language of the treaties into which it entered did not operate to terminate all of its rights, title and interest to its lands in the state of Wisconsin, including its usufructuary rights." App. 95. But the court decided to give the tribe another chance: it called for "contention interrogatories ... to learn the factual basis for its claims." Id. at 54. The court noted that the tribe was "noticeably reticent" to explain the basis of its claim, id. at 49, and during a later hearing expressed its frustration over the continued failure to explain.

> THE COURT: ... This case was filed ... [f]ifteen months ago. You must know what

> the basis for your filing is. ... [Y]ou have kept it a secret, and I think it's time to let it out.

Tr. 3/22/96 at 72.

> THE COURT: I did not criticize you for not bringing forth documents. I criticized you for not letting me know why you believed that these treaties could be interpreted to say something other than what they seem to say on their face.
>
> ...
>
> THE COURT: Anyone can walk into court and say we think that this treaty that says day is day and night is night should be interpreted to say day is night and night is day. That takes no effort whatsoever. But it's also a violation of the Rule 11.

Id. at tr. 73.

On receipt of the tribe's answers to contention interrogatories, the state renewed its motion to dismiss, relying only on the treaty language and historical materials from the tribe's answers to the contention interrogatories. R. 78, 79. While decision was pending, petitioner at no time sought leave to supplement its June 26, 1996, brief (R. 91) to explain how the experts' reports filed on September 3, 1996 (R. 99-104), might affect the pending decision. It did not flag them to the district court until after dismissal in its motion under Fed. R. Civ. P. 59(e). R. 108, 110-19. Nevertheless, on rehearing the court emphasized that it had "made a careful review of plaintiff's motion, supporting briefs and expert reports in an effort to ensure that none of plaintiff's arguments has been overlooked or construed incorrectly." App. 149.

In its dismissal decision, the district court treated the motion to dismiss as one for judgment on the pleadings and accorded the tribe's entire submissions, including its answers to contention interrogatories and its judicially noticeable historical materials, as supplemental allegations enjoying the same liberal indulgences as on a motion to dismiss. App. 100-02. The court of appeals did so as well. App. 12-14.

REASONS WHY THIS COURT SHOULD NOT GRANT THE PETITION

A. Summary

There are four reasons why this Court should not grant the petition for a writ of certiorari: (1) the case simply involves the application of unambiguous treaty language; (2) petitioner would undermine this Court's precedents that unambiguous language is controlling; (3) petitioner's contention, that the holdings below are contrary to two prior decisions of this Court, is being raised now for the first time and lacks merit; and (4) as an independent ground for affirmance, the Equal Footing doctrine extinguished these temporary rights when Wisconsin attained statehood in 1848.

This case presents nothing novel. The tribe merely refuses to accept plain and unambiguous treaty language. The tribe agreed in 1831 that its use rights west of the Fox River in Wisconsin would remain "until the President of the United States, shall deem it expedient to extinguish their title." App. 171. When notified of the government's "desire … to posses it," the "tribe promise[d] to surrender it immediately." Id. Thus, the treaty language itself made the rights title-dependent.

Critically, the tribe never doubts it lost title. Nor could it: the tribe ceded ownership of part of its remaining lands in 1836 and all of the rest in 1848. Rather, the tribe

simply does not want to follow the plain, unambiguous treaty language. As noted, the district court admonished tribal counsel of the Rule 11 consequences of arguing "that this treaty that says day is day and night is night should be interpreted to say day is night and night is day." This brief at 4.

Petitioner would undermine this Court's precedents that unambiguous language is controlling. It baldly told the district court that "treaty language is almost irrelevant" and that treaties "cannot speak for themselves,"[10] a position it reiterated in the court of appeals. Principal br. at 5 and reply brief at 9 (there need be "no threshold finding of ambiguity" to skip from the language to alleged Indian understanding).

By insisting that the tribe's subjective view is controlling regardless of the clarity of the language, the tribe would have this Court undermine the solemnity of treaties. No longer could Congress, the President, or anyone else rely on plain, ordinary words. What the Indians allegedly thought the words meant would be dispositive, even in the face of plain treaty language. This Court never has so held. Indeed, it has clearly and repeatedly held otherwise.

The tribe for the first time argues that the holdings below are contrary to Wisconsin v. Lane, 245 U.S. 427 (1918), and Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968). The tribe cited these cases below for different purposes than now advanced here.

Moreover, the contention wholly lacks merit. As to Lane, the tribe distorts this Court's language as meaning that the 1848 treaty gave them an indefinite right of occupancy on Wisconsin lands. In fact, Lane confirms the lower court holdings in this case that the Menominee remained in Wisconsin beyond the time allowed in the 1848 treaty as a matter of grace and discretion of the government. As to

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[10]R.25 at 37; R.109 at 16. *See also* R. 25 at 22-23, 31; R.109 at 41, 52.

Menominee Tribe of Indians v. United States, this Court held that the 1854 treaty, which created a reservation out of a small portion of the lands previously ceded (compare maps, App. 214 and App. 220), superseded Wisconsin's regulatory power by force of the Supremacy Clause, *but only as to the reservation lands.* 391 U.S. at 411 n.12. In fact, this Court acknowledged that the tribe had surrendered its off-reservation usufructuary rights in order to get on-reservation usufructuary rights. 391 U.S. at 406 n.2. In short, the tribe would have this Court reverse its holding that there no longer were off-reservation use rights.

In addition, under the Equal Footing doctrine these temporary rights established under the 1831 treaty were extinguished when Wisconsin attained statehood in 1848. Only permanent treaty-based rights survive statehood. The terms of the 1831 treaty manifestly bespeak temporary rights: the special rights would continue "until" title was extinguished and, once notified of the government's "desire ... to posses it," the "tribe promise to surrender it immediately." App. 171.

This is an entirely different case than Mille Lacs Band of Chippewa Indians v. Minn., 124 F.3d 904 (8th Cir. 1997), cert. granted, 118 S.Ct. 2295 (1998). The rights here were wholly title-dependent. The treaties here ceded title to the same lands with the title-dependent use rights, not to a separate parcel as in Mille Lacs. Last, Mille Lacs involves a challenge to the validity of an Executive order requiring the Indians to remove without first obtaining their consent. Here, the duty to remove was validated by Congress when it ratified the treaties which the tribe had signed and agreed to.

B. This case presents nothing novel.

1. The treaty unambiguously makes the hunting right title-dependent.

A case needs to present something exceptional to warrant this Court's discretionary review. A petition will be granted "only for compelling reasons." This Court's Rule 10.

There is nothing compelling here. The right to hunt was dependent on title to land. The tribe lost its title to land. Therefore, it lost its right to hunt. This case is that simple.

Title dependency is obvious on the face of the treaties. The 1831 treaty distinguished between lands east of the Fox River in Wisconsin and lands west of it. Regarding the lands east of the Fox, the tribe "cede[d] and forever relinquish[ed]" them to the United States. App. 166. Speaking to reserved use rights,

> The Menomonee ... shall be at liberty to hunt and fish on the lands they have now ceded to the United States, on the east side of Fox River and Green bay, with the same privileges they at present enjoy, until it be surveyed and offered for sale by the President; they conducting themselves peaceably and orderly.

App. 170 (emphasis added).

Turning to the west of the Fox, the treaty provided that the lands

> adjoining the farming country on the west side of the Fox river, will remain to them as heretofore, for a hunting ground, until the President of the United States, shall deem it expedient to extinguish their title. In that case, the Menomonee tribe promise to surrender it immediately, upon being notified of the desire of Government to possess it.

App. 171 (emphasis added).

Until this petition, the tribe has argued that its usufructuary rights under the 1831 treaty still existed *both* east and west of the Fox. In regard to the claim east of the Fox, the district court[11] and the court of appeals[12] each identified its many flaws. The tribe wisely abandons it here.

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[11]As the district court aptly said:

> The natural reading of that clause is that the Menominee could continue to hunt and fish on the ceded lands until the President sold the land but that their right to do so would expire before then if they did not behave in a peaceable fashion.

App. 117. Further, "there was no ambiguity about the fact that it [the liberty to hunt and fish] would end at some point, regardless how well the Menominee conducted themselves." App. 152. Indeed, the Menominee agreed the land was surveyed and offered for sale by 1834 or 1835. App. 4, 20-21, 151. The district court also identified other circular and contradictory reasoning in petitioner's argument. See App. 115, 152-53.

[12]After noting the land was surveyed and offered for sale in 1834, the court said:

> Therefore, according to the terms of the treaty, the usufructuary rights on the east side of the Fox were extinguished long before the Tribe and the United States entered into the 1848 Treaty. Because the right to hunt and fish on these lands was extinguished in 1834 through satisfaction of the conditional term (namely, the land was surveyed and offered for sale), it

Nevertheless, the tribe presses its claim west of the Fox. But it is equally without merit. The "hunting ground" would remain "until [the President] shall deem it expedient to extinguish their title," and the tribe "promise[d] to surrender it immediately, upon being notified of the desire of Government to possess it." App. 171.

Quite simply, once title was gone and once the government wanted it, the hunting ground was to be surrendered immediately. As the court of appeals stated, "[T]he 1831 Treaty explicitly links the right to hunt on the land to having title to the land." App. 22. It necessarily follows, as the district court held, "With the loss of title, the tribe lost the use rights that were dependent on title." App. 154.

The tribe lost title by ceding these lands west of the Fox River in its 1836 and 1848 treaties Therefore, it lost the hunting right.

> was unnecessary to explicitly abrogate the right to use lands east of the Fox in the 1848 Treaty, and even less reason to mention that right in the 1854 Treaty.

App. 20-21. As to the tribe's argument that the use rights would last so long as they behaved "peaceably and orderly," the court said:

> [T]he 1831 Treaty simply does not support such an interpretation: it does not distinguish between land actually sold and land offered for sale. Moreover, the government's express purpose for entering into the 1831 Treaty was to encourage the Menominee to become farmers and to use the land east of the Fox River for settlers. Allowing the Tribe to hunt on the lands that were not actually sold certainly would not have served the government's goals of discouraging the Tribe's pursuit of hunting and gathering food and encouraging settlement. Given this historical context, we will not ignore the plain meaning of the 1831 Treaty.

App. 21.

2. Having lost title, no other event was necessary to extinguish the usufructuary right.

Petitioner relies heavily on the fact the later treaties ceding all Wisconsin ownership interests do not also explicitly say that they swept in the temporary 1831 hunting rights west of the Fox. The short answer is that such a subsequent explicit abrogation was unnecessary because the 1831 treaty itself set forth the extinguishing condition, namely, loss of title. As the court of appeals said,

> The 1831 Treaty explicitly links the right to hunt on the land to having title to the land: the Treaty states that the Tribe's right to hunt on the land remained until the President extinguished their title to the land. The Treaties of 1836 and 1848, in which the Menominee ceded title to those lands, thus extinguished their right to use the land for hunting. Again, it was unnecessary to mention the usufructuary rights in the 1854 Treaty.

App. 22-23. The district court also put it nicely.

> It would be unnecessary for the government to provide expressly for the extinguishment of rights that were to expire of their own accord. The rights would be extinguished by the occurrence of the terminating events, as provided.

App. 56-57.

It is critical to observe that petitioner does not doubt that it lost title to the land.[13] The tribe, therefore, concedes that the extinguishing event occurred.

The tribe argues that the decisions below conflict with this Court's recognition in Oregon Department of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 765-766 (1985), that "Indians may enjoy special hunting and fishing rights that are independent of any ownership of land." Pet. 13. But Klamath undermines rather than supports the tribe's claim in this case. As this Court emphasized in Klamath, tribal use rights survive the cession of underlying title *only* if a treaty "created hunting and fishing rights that were *separate from and not appurtenant to*" ownership of the lands themselves; otherwise, "silence concerning specific rights ... is consistent only with an intent to end any special rights of the Tribe," and a conveyance of underlying title "*unquestionably* would encompass any special right to use the ceded lands for hunting and fishing" that "the Indians had previously possessed." Id. at 766, 768, 773 & n. 23 (emphasis added). In this case, not only were the tribe's hunting rights not "separated" from underlying title, the 1831 treaty expressly provided that they would last only *until* title itself was extinguished. When title was subsequently extinguished through the 1836 and 1848 treaties, this "unquestionably" extinguished the Menominee's "appurtenant" use rights as well. Id. at 766, 768.

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[13]It could not possibly make such an argument given the clarity of the treaty language of 1836 and 1848. Under the 1836 treaty, Article First, the Menominee "cede[d] to the United States, all of that tract or district of country" west of the Fox River described in that article. App. 190. Under the 1848 treaty, Article II, the Menominee "agree to cede, and do hereby cede, sell, and relinquish to the United States all their lands in the State of Wisconsin wherever situated." App. 199.

3. Alternatively, the 1836 and 1848 treaties independently extinguished the 1831 temporary use rights.

The 1836 and 1848 treaties did not merely cede title and all interests in the land. They also required the tribe to leave Wisconsin.[14] Thus, in addition to being the self-extinguishing events under the 1831 treaty, these treaties extinguished all interests even if the usufructuary rights had been indefinitely reserved in 1831. Until this suit, the tribe always admitted it had given up these interests. See its 1951 petition to the Indian Claims Commission that, by these treaties, it "relinquished and ceded ... all its right, title and interest ***in and to***" the affected tracts. App. 41. (emphasis added).

The duty to leave Wisconsin for Minnesota is wholly incompatible with retaining hunting rights in Wisconsin. As the district court said:

> [P]laintiff repeats its previous argument that because the 1848 treaty did not make explicit reference to abrogation of the use rights and the tribe never abandoned those rights or relinquished them voluntarily under the treaty, the rights remain in the tribe. This argument is logically inconsistent with the concept of

[14]Under the 1836 treaty, Article Fourth, "the said Menomonie nation do agree to remove from the country ceded, within one year after the ratification of this treaty." App. 193. Likewise, under Article II of the 1848 treaty the tribe ceded "all [Menominee] lands in the State of Wisconsin wherever situated," App. 199; under Article IV they received benefits "in consideration of their removing themselves, which they agree to do," App. 200; and under Article VIII they were allowed "to remain on the lands hereby ceded for and during the period of two years ... and until the President shall notify them that the same are wanted." App. 203. See the district court's extensive discussion, App. 127-30, 155-56.

> obligatory removal from the area in which the rights allegedly existed and it depends entirely on the flawed premise that the tribe's use rights were permanent in nature.

App. 156. The court of appeals said, "[T]he Menominee could not reasonably have expected to continue hunting and fishing on the land ceded in 1848, considering the Tribe had just agreed to leave the Wisconsin land and move to the Minnesota reservation approximately 300 miles away." App. 18.

It makes no difference that the Menominee did not in fact leave Wisconsin for Minnesota. By the 1854 treaty the tribe exchanged its 1848-granted Minnesota home for a Wisconsin reservation. The controlling decision is New York Indians v. United States, 170 U.S. 1 (1898). "[T]hat their failure to remove should result in a cancellation of the treaty, and a restoration to them of their rights in the Wisconsin, lands ... is precluded by the language ... which contains a present and irrevocable grant of the Wisconsin lands, and puts it beyond their power to revoke the bargain." Id. at 19. Therefore, as the court of appeals said, "The 1848 Treaty ... contained a present and irrevocable grant of the Wisconsin lands; the Tribe's refusal to move to Minnesota does not affect that grant in any way." App. 19. Or, as the district court put it:

> By ceding the Minnesota lands [in 1854], the Menominee acknowledged that the 1848 treaty had taken effect even though they had not removed to Minnesota. Otherwise, the Menominee would not have had the lands in Minnesota to exchange for those on its new reservation.

App. 129. " [B]y maintaining that it did cede its land, plaintiff recognizes that the 1848 treaty was not contingent

upon the exploratory trip or the removal. The plain language of the treaty supports this conclusion." Id. at 127. Further,

> The treaty took effect when it was signed, as shown by the fact that when the United States agreed not to force the Menominee to go west to lands they disdained, an entirely new treaty was negotiated, and made supplementary and amendatory to the 1848 treaty. Plaintiff does not contend that it did not obtain an interest in the lands in Minnesota when it signed the treaty. Obviously, those lands were the consideration for the grant of the Wolf River Reservation to plaintiff in 1854.

Id. at 155-56.

Here, the Menominee argue that the 1848 treaty right to remain for two years gave them a right to remain indefinitely. Apart from the tortured construction of the treaty language, however,[15] the Menominee conduct belies any such understanding. The tribe asked permission to remain longer and the President granted the request as an act of favor, not right.[16] This Court has noted this indisputable historical fact.

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[15]Article VIII provided:

> It is agreed that the said Indians shall be permitted, if they desire to do so, to remain on the lands hereby ceded for and during the period of two years from the date hereof, and until the President shall notify them that the same are wanted.

App. 203.

[16]The 1851 report of the Commissioner of Indian Affairs stated the following:

> The fall of last year was the period fixed upon for their removal; but owing to their urgent appeals, and those of many of the whites in their immediate vicinity, and in consideration of their peaceful habits, the President granted them permission to remain until the 1st of June,

See Beecher v. Wetherby, 95 U.S. 517, 526-27 (1877) ("the President permitted their **temporary** occupation") (emphasis added.) Also see Wisconsin v. Lane, 245 U.S. 427, 429-30 (1918) ("the President gave the Indians permission to remain upon the ceded lands until June 1, 1851; this time was subsequently extended by the President to October 1, 1852").

Petitioning to stay is the opposite of asserting a right to stay. The court of appeals rhetorically asked: "if in 1850 the Tribe did not believe that the 1848 Treaty was binding, why did the Tribe seek the president's permission to remain on land in Wisconsin; if the Treaty was non-binding such permission would obviously have been unnecessary." App. 18.

All this undisputed historical evidence rejects the present-day Menominee claim of having thought they had a treaty right to occupy Wisconsin land indefinitely. Indeed, the 1854 treaty preamble itself stated that the tribe remained in Wisconsin beyond the two years because "the President [had] consented to their locating ***temporarily*** upon the Wolf and Oconto Rivers." App. 206 (emphasis added). Summarizing, the district court correctly said:

> of the present year. At the expiration of this last named period, it being known that they had made no arrangements, and were in no condition to emigrate, the President again, at their earnest solicitation, consented that they might remain a twelvemonth longer, on condition, however, that they should not interfere with the public surveys, and with the distinct understanding that this extension of time was to be considered an act of favor, they being still subject to removal at his discretion; and of this Superintendent Murray was instructed to take care that they should be fully advised.

(AROCIA 1851) (Ct. App. appendix 139(5)). The district court recited other indisputable public records showing the Menominee understood they remained by sufferance and favor, not by a reserved use right or a right to revoke a treaty. App. 128-29; R. 15; R.71 (tab 11 at 52).

> Plaintiff has identified no material ambiguity that would suggest it could prevail upon its claim. ... [P]laintiff has failed to allege any facts that would show that the 1848 treaty is anything other than an obligatory removal treaty that extinguished **at its signing** any remaining rights plaintiff may have possessed within or with respect to its former territory. The government's agreement to let plaintiff remain in Wisconsin for two years gave plaintiff nothing more than a conditional right to stay and to hunt, fish and gather while it remained. The agreement did not restore the usufructuary rights lost with the occurrence of the events specified in the 1831 treaty or with the signing of the 1848 treaty.

App. 159-60 (emphasis the court's). See also the district court's recitations of the tribe's many historical admissions and representations that it had given up all off-reservation rights. App. 132-33, 139-40.

4. The lower courts did not confuse use rights with title to land.

Petitioner also contends that the lower courts muddled the fact that use rights and title are severable and that the former does not necessarily require the latter.

The district court said it best. "That is not the issue. The issue is whether plaintiff gave up both rights in the 1831 treaty." App. 113. The district court similarly rejected petitioner's argument that the Menominee understood that their use right was not an interest in land but an immunity from state

regulation, citing their expert Professor Lund.[17] The district court said:

> Lund suggests that plaintiff's use rights reserved by the 1831 treaty were not interests in land but were instead a privilege and immunity from state regulation. Even if Lund's theory is correct, it does not change the fact that plaintiff's "privilege and immunity" expired with the occurrence of the extinguishing events explicitly set forth in the 1831 treaty.

App. 113-14[18]

C. Petitioner would undermine this Court's precedents that unambiguous language is controlling.

By ignoring the explicitly title-dependent nature of their 1831 use rights the tribe invites this court to hold that unilateral Indian understanding prevails over unambiguous

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[17]Note the district court's considerations of petitioner's experts' reports. Also see App. 157-59. Contrary to petitioner's suggestion here, the lower courts did not ignore what petitioner wanted to present through these experts. Rather, as the district court put it in denying petitioner's motion for reconsideration, it "made a careful review of plaintiff's motion, supporting briefs and expert reports in an effort to ensure that none of plaintiff's arguments has been overlooked or construed incorrectly." App. 149. The record also shows that, prior to its order dismissing the action, petitioner filed its expert reports but at no time asked to supplement its briefing to explain how they contributed to the tribe's claim.

[18]Besides, the law is pellucidly certain that usufructuary rights are interests in land. App. 135-37. Indeed, the tribe is judicially estopped from saying otherwise because it successfully argued before the Wisconsin Supreme Court that the use rights **were** interests in land, "exactly what plaintiff disavows in this case." App. 137-38.

treaty language. Its words to the district court were that "treaty language is almost irrelevant." This brief at 6.

This Court has never so held. Whereas the petitioner thinks all Indian treaty cases require extensive evidentiary data and findings, this Court has held that unambiguous language controls. Indian treaties

> are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." ... But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.

Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943) (citations omitted).[19]

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[19]See also South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986)("The canon of construction regarding the resolution of ambiguities in favor of Indians ... does not permit reliance on ambiguities that do not exist ..."); Klamath, 473 U.S. at 774 ("courts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' ... clearly runs counter to a tribe's later claims"); DeCoteau v. District County Court for the Tenth Judicial District, 420 U.S. 425, 447 (1975)("A canon of construction is not a license to disregard clear expressions of tribal and congressional intent"); Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 179, 180 (1947)("we cannot, under the guise of interpretation, ... rewrite congressional acts so as to make them mean something they obviously were not intended to mean. ... We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so"); Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945)(a court must "stop short of varying [a treaty's] terms to meet alleged injustices"); United States v. Choctaw and Chickasaw Nation, 179 U.S. 494, 541 (1900)("it is not for the judiciary to defeat the will of the

This Court never should so hold. It would be unprincipled to do so. Treaties have features both of contracts and laws. See court of appeals citations, App. 15. If their words are to be meaningful they must have some controlling force. They are, after all, the "supreme law of the land." Menominee Tribe v. United States, 391 U.S. 404, 411 n.12 (1968) (internal quotes omitted).

And it would produce chaos to so hold. An opinion of subjective Indian understanding would last only until displaced by another opinion. As Judge Wood sagely noted here.

> It is no surprise that some Native Americans of this generation are dissatisfied with what their prior generations agreed to in order to resolve their problems of earlier times. Times change and people change, but treaties do not.

App. 29.

D. The claimed inconsistency with this Court's precedents is raised for the first time and is without merit.

This Court will not deal with an issue raised for the first time on certiorari, and it requires that an argument be well developed and presented below. See Youakim v. Miller, 425 U.S. 231, 234 (1976) (*per curiam*). Petitioner contends that the lower courts failed to follow this Court's holdings in Wisconsin v. Lane, 245 U.S. 427 (1918), and Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968). Respondents have lodged petitioner's briefs below with this Court. They show that petitioner has failed to meet this

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legislative branch of the Government by giving to an Indian treaty a meaning not justified by its words").

Court's standards for presenting issues well developed below.

As to Wisconsin v. Lane, this Court held that the action of Congress in 1852 authorizing the tribe to remain temporarily on what became reservation lands, together with the 1854 treaty's grant of a reservation, superseded Wisconsin's claim to section 16 school lands thereon. Petitioner now argues this Court also held that this meant the 1848 treaty failed to defeat the tribe's 1831 use rights. But petitioner came nowhere near this proposition below. The only remote resemblance was in the tribe's principal brief in the court of appeals when it said Lane "concluded that the Menominee had continuous lawful occupation in Wisconsin during those years" of 1848 to 1854. Page 36. This single sentence is all there was. There was no reference to section 16 lands on or off reservation. None of this Court's language was quoted. There was no analysis at all. There was nary a word that this Court held the 1848 treaty left the 1831 rights undisturbed. The case was simply cited for the entirely distinct point that the tribe's remaining beyond the two years was lawful, a point the state never disputed.

As to Menominee Tribe of Indians v. United States, the tribe here argues this Court held that the 1848 treaty gave Wisconsin no regulatory power anywhere in the state. No such contention was made below.

Moreover, neither decision supports the tribe's position in this case. Both decisions, in fact, reinforce the lower courts' conclusions.

Wisconsin v. Lane held that the 1852 congressional action and the 1854 treaty granting a reservation superseded the grant to Wisconsin of section 16 lands *on the reservation*. 245 U.S. at 433-34. That is not at all inconsistent with saying that the "President granted them permission to remain" beyond the two years in the 1848 treaty as "an act of favor,

they being still subject to removal at his discretion." This brief at 15-16 n.16. Nor is it inconsistent with this Court's further statement in Lane itself that, by the 1848 treaty, the Menominee Indians "gave up their holdings in Wisconsin." 245 U.S. at 432. Losing 1831 use rights by 1848 and lawfully remaining thereafter while a new reservation was established are not mutually exclusive. Indeed, that is exactly what happened.

As to Menominee Tribe of Indians v. United States, this Court clearly confined the limitation on the state's regulatory powers to the reservation lands created under the 1854 treaty. 391 U.S. at 411 n.12. In addition, rather than holding that the 1848 treaty was ineffectual to give Wisconsin off-reservation regulatory power, this Court held that the Menominee had traded in their off-reservation use rights for those on-reservation.

> "It would seem unlikely that **the Menominees** would have **knowingly relinquished their special fishing and hunting rights** which they enjoyed on their own lands, and have accepted in exchange other lands with respect to which such rights did not extend. They undoubtedly believed that these rights were guaranteed to them when these other lands were ceded to them 'to be held as Indians lands are held.' Construing this ambiguous provision of the 1854 treaty favorably to the Menominees, we determine that they enjoyed the same exclusive hunting rights free from the restrictions of the state's game laws over the ceded lands, which comprised the Menominee Indian Reservation, as they **had** enjoyed over the lands ceded to the United States by the 1848 treaty."

391 U.S. at 406 n.2 (emphasis added) (quoting from State v. Sanapaw, 21 Wis. 2d 377, 124 N.W.2d 41 (1963), cert. denied, 377 U.S. 991 (1964)).

This Court should note that the lower courts did not accept this argument. The court of appeals concluded this Court decided a different question, namely, the effect of the legislation terminating tribal status. App. 10-11. The district court agreed that on its appeal to this Court the tribe "seems to have adopted the position that, in fact, it had lost its off-reservation fishing and hunting rights in the nineteenth century." App. 140. But it believed this Court resolved that case "on other grounds." App. 79 and 87-88.

Both courts are mistaken. Not only did the tribe press this Court to agree it had given up its off-reservation use rights, this Court so decided. The issue here was not only the effect of termination legislation. The question also was whether the tribe had any on-reservation use rights after 1848 and prior to termination. As seen, this Court said yes and adopted the logic of the Wisconsin Supreme Court, at the tribe's urging, that it would have made no sense for the tribe to give up its off-reservation use rights without getting on-reservation use rights. The loss of off-reservation rights was a linchpin to this Court's analysis.

E. In any event, there is an independent ground for upholding the decision: statehood extinguished these temporary rights under the 1831 treaty.

Regardless of what this Court should decide about the canons of treaty construction as applied to these treaties, the decision below must be upheld because Wisconsin's admission to the Union in 1848 independently extinguished the Menominees' temporary, title-dependent and aboriginal rights

under Ward v. Race Horse, 163 U.S. 504 (1896). There, prior to statehood, a treaty granted a tribe the right to "hunt upon the unoccupied lands of the United States." Id. at 505. The Territory of Wyoming was established with a proviso that nothing would "'impair the rights of person or property now pertaining to the Indians.'" Id. at 506. But the law admitting Wyoming to the Union provided that it entered "'on an equal footing with the original States in all respects whatever.'" Id.

Ward concluded statehood extinguished hunting rights. It noted their "temporary and precarious" nature: they were "subject entirely to the will of the United States, since ... the right to hunt should cease the moment the United States parted with the title to its land in the hunting districts." Id. at 510. Second, Wyoming entered the Union on "equal footing" with the original states. The Act admitting Wyoming "expressly declared that that State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians." Id. at 511. Thus, the conflict between hunting rights and statehood was "irreconcilable" because "under no reasonable hypothesis can [they] be construed as coexisting". Id. at 514-15.

Race Horse applies here. The reserved treaty rights were not permanent and were subject to the will of the United States. The Act creating the Wisconsin Territory (5 Stat. 10) contained an express reservation of Indian rights. But both the Enabling Act of 1846 (9 Stat. 56) and the Act admitting Wisconsin to the Union in 1848 (9 Stat. 233) were silent on the subject. The latter, however, assured Wisconsin admission on an equal footing.

The district court did not accept this argument. "If, in fact, the rights granted plaintiff in the 1831 treaty are temporary in nature, as defendants contend, then the rights expired on their own terms and the equal footing doctrine has no relevance." App. 64. But the court missed the alternative nature of the argument. Even if the extinguishing events never

occurred, *i.e.*, even if title never were otherwise lost, statehood extinguished the temporary rights. The court of appeals did not discuss the issue.

F. Nothing in the Chippewa treaty litigation will affect the result of this case.

Petitioner, anticipating that this Court will affirm Mille Lacs Band of Chippewa Indians v. Minn., 124 F.3d 904 (8th Cir. 1997), cert. granted, 118 S.Ct. 2295 (1998), asks this Court to remand this case once it does so. It asserts there is a similarity in the language of the 1855 treaty[20] in Mille Lacs and the 1848 treaty here[21] but that the two circuits took opposite approaches to treaty interpretation.

The cases are quite dissimilar. The 1855 Mille Lacs treaty, despite very express cession language, was held not to extinguish usufructuary rights reserved under an 1837 treaty.[22] But the rights under the 1837 treaty were not title-dependent. They were expressly severed from title and were to continue indefinitely "during the pleasure of the President." 124 F.3d at 910. Here, the temporary use rights were "inextricably joined" to title, as the court of appeals said, App. 23, not to the pleasure of the President.

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[20]February 22, 1855, art. 1, 10 Stat. 1165. The language of relinquishment was that the Indians "do further fully and entirely relinquish and convey ... any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." 124 F.3d at 920.

[21]The tribe agreed "to cede, and do hereby cede, sell, and relinquish to the United States all their lands in the State of Wisconsin wherever situated." Article II; App. 199.

[22]July 9, 1837, 7 Stat. 536.

Moreover, the 1855 and 1837 Minnesota treaties covered distinct parcels of Minnesota lands. Id. at 919-20. Here, the 1848 treaty ceded ***all*** Wisconsin lands including those that were the subject of the 1831 treaty. Thus, in Mille Lacs the issue is whether the relinquishment relating to parcel A is sufficiently clear to extinguish use rights on parcel B. It is entirely different to argue, as the Menominee do here, that the relinquishment of all Wisconsin lands to remove to Minnesota did not extinguish temporary, title-dependent use rights thereon.

Last, Mille Lacs involves the President's authority regarding an Executive order that required the Indians' removal. The Eighth Circuit held that, without Indian consent, the President lacked authority to remove them and, therefore, lacked authority to revoke their use rights. 124 F.3d at 916-18. Here, there is no issue of a valid or invalid Executive order regarding removal. In fact, Congress ratified the 1836 and 1848 treaties that extinguished title and required the Menominee to remove. That made the treaty-imposed duty to remove the "supreme law of the land." Menominee Tribe v. United States, 391 U.S. 404, 411 n.12 (1968) (internal quotes omitted). Critically, because the duty to remove was by treaty, the Menominee **agreed** to remove. Neither Indian consent nor removal authority is an issue here.

Accordingly, any possible holding in Mille Lacs that the 1855 treaty did not extinguish reserved rights on a different parcel of land could not affect the issue in this case whether cession of title in a removal treaty terminated title-dependent rights on the same parcel. Likewise, a holding in Mille Lacs that the President had no authority to revoke use rights, absent Indian consent to remove, could not affect the issue whether title-dependent rights were terminated under congressionally-approved removal treaties in which the Indians agreed to cede title. These are entirely different cases.

These noted distinctions in the two cases make any differences in "approaches" an apples-oranges comparison. Moreover, the tribe's claim that the approaches are different is illusory. The Eighth Circuit focused first on the treaty language before concluding it could proceed to look for record evidence as to Indian understanding.[23] One can agree with Minnesota that the Eighth Circuit failed to give meaning to the plain language of the 1855 treaty, and that it failed to adequately distinguish this Court's holding on virtually the same language in Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985), but still agree that the court saw the importance of first reviewing the treaty language.

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[23]The court found that the 1855 treaty lacked explicit language of termination. Mille Lacs at 920 ("the 1855 Treaty is void of explicit language extinguishing the Band's usufructuary rights, nor does it mention the 1837 Treaty"). Regarding the 1854 treaty, the court observed the requirement that treaty-based rights require an explicit termination and relied only on the treaty language to conclude the evidence against extinguishment was "overwhelming." Mille Lacs at 919. It relied solely on the facts that the 1837 treaty contained an express reservation on ceded lands and that the 1854 treaty did so as well on the newly ceded lands. Id. Consequently, in applying the explicitness rule and in adhering strictly to the treaty language, Mille Lacs is the diametric opposite of petitioner's approach.

CONCLUSION

The petition should be denied.

Dated this 8th day of March, 1999.

Respectfully submitted,

JAMES E. DOYLE
Attorney General

CHARLES D. HOORNSTRA
Assistant Attorney General
State Bar No. 1010601
Counsel of Record

THOMAS DOSCH
JOHN NIEMISTO
PHILIP PETERSON
Assistant Attorneys General

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9945

No. 98-1306

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In The

Supreme Court of the United States

October Term, 1998

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Petitioner,

v.

TOMMY G. THOMPSON, Governor of the State of Wisconsin; GEORGE E. MEYER, Secretary, Wisconsin Department of Natural Resources; JAMES T. ADDIS, Administrator, DNR Division of Resource Management; JOHN E. FRYATT, Administrator, DNR Division of Enforcement; HERBERT F. BEHNKE, TRYGBE A. SOLBERG, NEAL W. SCHNEIDER, BETTY JO NELSEN, MARY JANE NELSON, JAMES E. TIEFENTHALER, JR., and STEPHEN D. WILLETT, Members, Wisconsin Natural Resources Board,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

BRUCE R. GREENE
Counsel of Record

M. CATHERINE CONDON
GREENE, MEYER & MCELROY, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
(303) 442-2021

JAMES M. JANNETTA
523 Ashmun Street
Sault Ste. Marie, Michigan 49783
(906) 635-6050

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. INTRODUCTION

Pursuant to SUP. CT. R. 15.6, the Menominee Indian Tribe of Wisconsin ("the Tribe") respectfully submits this memorandum in reply to the *Brief in Opposition* (Mar. 17, 1999) ("Opp. Brief") filed by certain State officials ("the State"). The Tribe will address only the Court's recent ruling in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 525 U.S. ___, No. 97-1337 (Mar. 24, 1999), and certain procedural issues raised in the State's Opp. Brief.

II. ARGUMENT

A. THE *MILLE LACS* DECISION CONTROLS THIS CASE.

No decision of this Court more starkly illuminates the error in the approach of the courts below in this case than the recent decision in *Mille Lacs*. This decision reiterates and clarifies that Indian treaties can only be interpreted in light of their history and negotiations, and must be interpreted according to the Indian understanding of them. This, in turn, requires the development of a full factual record – the opportunity for which was denied the Tribe by the lower courts in this case.

The *Mille Lacs* decision was based upon such a record. The Court's opinion began with a lengthy recitation of facts based upon the expert reports and extensive documentary evidence developed at trial. Slip op. at 1-11. In fact, the Court repeatedly cites the reports of two experts who also filed reports on behalf of the Tribe's

claims in this case: Dr. Bruce M. White, *id.* at 3, 4, 5, 6, 20; and Prof. Charles E. Cleland, *id.* at 3, 4, 19, 20.[1]

The most relevant portion of the opinion for present purposes, however, is Section III, *id.* at 21-29, which not only deals with treaty language substantially similar to that of the 1848 Treaty involved in this case, App. 199, but also rejects the approach taken by the lower courts in this case *and* their interpretation of *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753 (1985). The treaty language at issue in Section III is a provision of an 1855 treaty with the Chippewa under which the Indians "fully and entirely relinquish and convey . . . any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in and to" any remaining lands. Treaty of Feb. 22, 1855, art. I, 10 Stat. 1165. The issue was whether this language, remarkably similar to that in the 1848 Treaty in this case,[2] extinguished previously reserved usufructuary rights.

The Court began its analysis by noting that the 1855 treaty language mentions neither the prior treaty nor usufructuary rights. *Mille Lacs*, slip op. at 22. The same may be said for the 1848 Treaty in this case. The Court then addressed the State's contention that the language

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[1] Two of the Tribe's other four experts in this case, Dr. James McClurken and Prof. Thomas Lund, also wrote reports and testified for the tribes in *Mille Lacs*.

[2] "The said Menomonee tribe of Indians agree to cede, and do hereby cede, sell, and relinquish . . . all their lands in the State of Wisconsin wherever situated." App. 199, art. II. Usufructuary rights were previously reserved in these lands in the 1831 treaty. App. 171, ¶ Sixth.

quoted above abrogated the previously reserved rights. In doing so, the Court set the process for interpreting Indian treaties:

> [T]o determine whether this language abrogates Chippewa Treaty rights, *we look beyond the written words to the larger context that frames the Treaty,* including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.' . . . In this case, an examination of the historical record provides insight into how the parties to the Treaty understood the terms of the agreement. This insight is especially helpful . . . because *we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.*

Id. at 22-23 (citations omitted) (emphasis added).

The Court proceeds to make it very clear that the treaty language cannot be interpreted in isolation, and that treaty ambiguity need not be intrinsic; that is, contained in the words themselves. Quite the contrary: only after the historical record has been examined can the treaty be interpreted.

> At the very least, the historical record refutes the State's assertion that the 1855 Treaty 'unambiguously' abrogated the . . . rights. Given this plausible ambiguity, we cannot agree with the State. . . . We have held that Indian treaties are to be interpreted liberally in favor of the Indians, . . . and that any ambiguities are to be resolved in their favor . . . .

Id. at 26-27 (citations omitted). This approach is exactly that urged by the Tribe in this case and rejected by the lower courts at the State's urging.

Furthermore, the Court in *Mille Lacs* rejected the approach to *Klamath* which was advanced by the State and adopted by the lower courts in this case. In so doing, the Court reiterated that Indian treaty cases cannot be decided upon the language of the treaty alone, but only upon a full historical record:

> [T]he State's argument that similar language in the two Treaties involving different parties has precisely the same meaning *reveals a fundamental misunderstanding of basic principles of treaty construction.* Our holding in Klamath was not based solely *on the bare language.* . . . Rather, to reach our conclusion about the meaning of the language, we examined the historical record and considered the context of the treaty negotiations to discern what the parties intended by their choice of words. *This review of the history and the negotiations of the agreements is central to our interpretation of treaties.*

Mille Lacs, slip op. at 28-29 (citations omitted) (italicized emphasis added) (underlined emphasis in original).

The lower courts in this case, at the prompting of the State, ignored these fundamental precepts of Indian law – indeed, of treaty interpretation generally[3] – by seizing upon bare treaty language alone along with a few selected documents, while ignoring altogether the six expert reports and the hundreds of documents supporting them that had been filed with the district court. There can be no doubt after *Mille Lacs* that Indian treaties *must* be interpreted based upon a full understanding of the

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[3] *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. ___, slip op., at 9 (1999).

history and surrounding circumstances, and particularly in light of the Indian understanding of the treaties.[4] This cannot be done upon a motion for judgment on the pleadings at the threshold of the case. It requires a full record, developed at trial or perhaps upon summary judgment after discovery. To date, every case but this one has done so. By short-circuiting this process, the lower courts ignored the fundamental rules and denied the Tribe their day in court.

B. THE STATE GLOSSES OVER THE PROCEDURAL DEFECTS IN THE DISTRICT COURT'S DISMISSAL OF THE TRIBE'S COMPLAINT.

The State attempts to simplify and rationalize the procedural issues in this case. Opp. Brief at 3-5. In the process, the State has distorted what actually occurred. Along with the district court's failure to follow the long-standing canons of treaty construction by dismissing this case on a threshold motion without the benefit of a record, the district court was impatient to reach the merits of the case throughout the proceedings. The Tribe, from the beginning, resisted the court's impulse to leap immediately to the fact-finding portion of the case. In its haste, the court brushed aside the Federal Rules of Civil Procedure and fundamental notions of fairness.

After the district court denied the State's initial motion to dismiss, App. 31, the issue of leaping ahead to the fact-finding phase came up at the pretrial conference

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[4] Astonishingly, the appeals court brazenly stated that the Indians' understanding of the critical 1848 Treaty was "*irrelevant.*" App. 23 (emphasis added).

portion of the hearing held on March 22, 1996, when the State indicated a desire to serve contention interrogatories, as the court had suggested in its opinion on the motion. App. 54. The Tribe resisted this as premature. Nonetheless, the district court brushed this aside, stating: "It's time to put some evidence on the record."[5] This statement sums up the court's procedural error in this case. The court proceeded to give the Tribe 30 days in which to answer the State's contention interrogatories – April 22, 1996. It also set a deadline for disclosure of the Tribe's experts (and hence the filing of their expert reports) of August 1, 1996, more than three months after the Tribe was ordered to respond to the State's contention interrogatories.[6]

The Tribe timely filed answers to the interrogatories, but noted in a general objection that the interrogatories were premature and disruptive of the discovery process because they conflicted with the rules governing expert reports.[7] The answers included 25 pages of factual

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[5] *Transcript of Motion Hearing and Pretrial Conference Held Before the Honorable Barbara B. Crabb* at 75 (Mar. 22, 1996).

[6] *Id.* at 76. Upon stipulation of the parties, the pretrial conference order was amended by order of the court on July 19, 1996. It extended the deadline for the Tribe's expert reports by one month, to September 3, 1996, and the State's deadline by two months. Other deadlines were adjusted accordingly. *Order Approving Stipulation re: Amending Preliminary Pretrial Conference Order* (July 19, 1996).

[7] *Plaintiff Menominee Indian Tribe of Wisconsin's Answers to Defendants' First Set of Interrogatories and Request for Production of Documents, Contention Interrogatories, Under the Court's Decision of February 26, 1996, and Relating to Judicial Estoppel* at 2-3 (Apr. 22, 1996).

narrative on the merits, a short preliminary expert report, and 22 pages produced in response to an accompanying request for production.

Upon receipt of the Tribe's answers to the interrogatories, the State filed a renewed motion to reconsider its original Rule 12(b)(6) motion to dismiss. In response, the Tribe objected to the procedural impropriety of the renewed motion and urged the court to deny the motion without considering the discovery materials or to explicitly convert the motion to one for summary judgment and give the parties an opportunity to respond accordingly.[8]

On September 16, 1996, the court issued its decision on the renewed motion to dismiss. In the guise of granting a motion for judgment on the pleadings, the district court in fact conducted something akin to an "in camera trial" by selective document while ignoring the Tribe's voluminous experts' reports, filed two weeks prior to the court's dismissal, and the hundreds of historical documents upon which the reports were based. In fact, the court did not even acknowledge the existence of the Tribe's experts' reports.[9] App. 96.

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[8] *Menominee Indian Tribe of Wisconsin's Brief in Response to Defendants' Renewed Motion to Reconsider or, in the Alternative, to Amend to Allow for Interlocutory Appeal* at 3-4 (June 25, 1996).

[9] The Tribe subsequently filed its *Memorandum Brief in Support of Motion to Alter or Amend Judgment* (Sept. 27, 1996), which was denied by the court as well. In its November 15, 1996 opinion, the court did acknowledge that the six expert reports were filed by the Tribe. However, except for the fleeting reference to the Lund Report, the contents of the reports were never discussed. App. 148.

The Tribe's objection to proceeding with discovery before the experts' reports were filed was well-founded. Contention interrogatories "are more appropriate after a substantial amount of discovery has been conducted." *Nestle Foods Corp. v. Aetna Casualty & Sr. Co.*, 135 F.R.D. 101, 111 (D. N.J. 1990). Placing the contention interrogatories as the first order of business was therefore wrong, and the Tribe was correct in objecting to them as premature.

The objection that the interrogatories usurped and disrupted the expert report process was also well-grounded. The district court assumed that the contention interrogatories were directed to identifying the Tribe's theory of the case. App. at 98, 107. The interrogatories asked: "Upon what [facts] will plaintiff rely [to establish] [to prove] [to support the assertion that] [to show]. . . ."[10] Since the interrogatories were aimed solely at the evidence, and not the theories or legal contentions, in the context of this case they requested disclosure of the substance of the Tribe's expert reports.

This type of inquiry is what the 1993 amendments to the discovery rules were designed to prevent. The new rule explicitly prohibits taking an expert's deposition before the expert's report has been filed. FED. R. CIV. P. 26(b)(4)(A). This provision was inserted because such discovery in advance of the report is premature, inefficient, and prejudicial. *See* FED. R. CIV. P. 26 Advisory

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[10] *Defendants' First Set of Interrogatories and Requests for Production of Documents, Contention Interrogatories, Under the Court's Decision of February 26, 1996, and Relating to Judicial Estoppel*, Interrogatory Nos. 1-9 (undated).

Committee Notes to 1993 Amendments, 146 F.R.D. 401, 638-39 (1993). While the rule by its terms does not prohibit factual contention interrogatories, the same rationale applies where as here the interrogatories in effect seek disclosure of the information in the expert reports. The court, then, should have postponed response to the premature interrogatories until after the expert reports had been filed, as the Tribe urged.

The district court's error on the interrogatories response was then enormously compounded when it relied upon those responses to dismiss the case in the guise of a judgment on the pleadings. The court's duty was plain: "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." FED. R. CIV. P. 12(c). *See also Venture Associates Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993).

Inexplicably, the district court was impatient with the Tribe and hostile to its claims. As *Mille Lacs* confirms, however, there is no doubt that the district court should have allowed the case to proceed through the submission of the Tribe's experts' reports, disclosure and submission of the State's experts' reports, if any, and discovery, to trial.

III. CONCLUSION

Based on the reasons set forth in the Tribe's petition and the arguments set forth above, the Court should either: (1) grant the petition and summarily reverse the court of appeals' decision in light of the *Mille Lacs* opinion; or, in the alternative, (2) remand to the court of

appeals to reconsider its ruling in light of *Mille Lacs*. The Tribe is entitled, now more than ever, to the opportunity accorded all other Indian tribes in similar litigation – to make its record regarding the meaning of these treaties. Only then will the district court be able to properly reach any conclusions regarding the Tribe's use rights.

Respectfully submitted,

BRUCE R. GREENE
Counsel of Record

M. CATHERINE CONDON
GREENE, MEYER & MCELROY, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
(303) 442-2021

JAMES M. JANNETTA
523 Ashmun Street
Sault Ste. Marie, Michigan 49783
(906) 635-6050

Attorneys for Petitioner

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION

788

JAMES E. DOYLE
Attorney General

CHARLES D. HOORNSTRA
Assistant Attorneys General
State Bar No. 1010601
Counsel of Record

THOMAS DOSCH
JOHN NIEMISTO
PHILIP PETERSON
Assistant Attorneys General

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9945

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This Court's Rule 15.8 1

Pursuant to Rule 15.8 of this Court, Respondents respectfully submit this supplemental brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

On March 24, 1999, which was subsequent to respondents' brief in opposition, the Court decided Minnesota v. Mille Lacs Band of Chippewa Indians, __U.S.__, No. 97-1337 (March 24, 1999). Petitioner's reply to the brief in opposition relied heavily on that decision.

This supplemental brief is confined to the Mille Lacs decision and petitioner's comments on it.

ARGUMENT

MILLE LACS SUPPORTS THE DECISION BELOW AND WARRANTS NEITHER A SUMMARY REVERSAL OR REMAND

The Menominee argue that Mille Lacs vindicates its position that a treaty rights case cannot be decided on treaty language alone, but requires a full record that takes into account all the historical circumstances and upholds the Indians' interpretation. To the contrary, Mille Lacs supports the decisions below.

Petitioner completely misses the pivotal point in Mille Lacs. Distinguishing Oregon Department of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985), the Court said:

> Klamath does not control this case. First, the Chippewa's usufructuray rights under the 1837 Treaty existed independently of land ownershp; they were neither tied to a reservation nor exclusive. In contrast to

> *Klamath*, there is no background understanding of the rights to suggest that they are extinguished when title to the land is extinguished. Without this background understanding, there is no reason to believe that the Chippewa would have understood a cession of a particular tract of land to relinquish hunting and fishing privileges on another tract of land.

Slip op. 28 (emphasis added). In other words, as stated in respondents' brief in opposition, petitioner wholly fails to deal with the apples-oranges difference in the two cases. "[A]ny possible holding in Mille Lacs that the 1855 treaty did not extinguish reserved rights on a different parcel of land could not affect the issue in this case whether cession of title in a removal treaty terminated title-dependent rights on the same parcel." Br. in opp. at 26.

The Court further explained the difference between the non-dependent Chippewa reserved rights and title-dependent rights. Unlike the treaty right in Ward v. Race Horse, 163 U.S. 504 (1896), "the 1837 [Chippewa] Treaty does not tie the duration of the rights to the occurrence of some clearly contemplated event." Slip op. 34. As seen, the 1831 Menominee treaty does. Here, as in Race Horse, there was a "fixed termination point;" the treaty "contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned;" "the happening of these conditions was 'clearly contemplated' when the Treaty was ratified." Slip op. 34 (internal citations omitted).

Contrary to petitioner's suggestion, nowhere did this Court repudiate its holdings that unambiguous treaty language controls. See citations, br. in opp. at 19 n.19. Rather, Mille Lacs simply applied the general rule requiring express language of termination of earlier reserved rights, absent which outside evidence is needed. See Mattz v. Arnett, 412 U.S. 481, 505 (1973) (an intent to terminate

"must be expressed on the face of the Act ***or*** be clear from surrounding circumstances and legislative history") (emphasis added). This rule is inapplicable here, of course, because the 1836 and 1848 treaties merely were the extinguishing events expressly contemplated in the 1831 treaty.

Moreover, apart from the 1836 and 1848 treaties as satisfying the title-contingency of the 1831 rights, Mille Lacs confirms that their removal nature independently extinguished those rights. The Court did so in holding that President Taylor's revocation of use rights necessarily was but a part of the removal objective. Slip op. 18-21. The duty to remove and a claimed reserved right to fish are mutually exclusive. Critically, unlike the removal order in Mille Lacs, the petitioner does not challenge the validity of the treaty-based removal obligation here.

Besides, the courts below ***did*** consider the historical context. The district court considered petitioner's entire array of expert opinion and historical data to assure full understanding of the tribe's position. Br. in opp. at 18 n.17. In addition, it canvassed several other contextual arguments, including the contention that the tribe was dependent on continuing use rights, App. 109-10; the historical data showing the purpose to convert the Indians into farmers, id. 110-11; that the "[h]istorical documentation submitted by" petitioner itself failed to bolster its claim that it failed to understand the limited duration of the use rights, id. 112; the claim that language barriers prevented full understanding, id. 114-15; consideration of the terms of other treaties, id. 117; the tribe's historical proffer that the rights were not title-dependent but only an unexercised option to take, id. 118-20; the effect of the government's representations during treaty negotiations, id. 122; the fact that the tribe continued to hunt and fish, id. 123, 125; tribal understanding of the duty to remove in the 1848 treaty, id. 126, 128-29; tribal understanding in the post-treaty years, id. 131-32, 136-40;

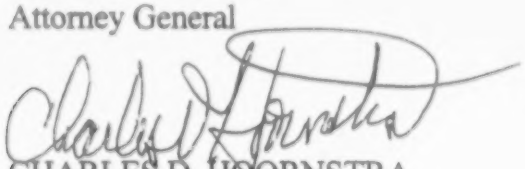
and the undisputed historical evidence that the 1831 surveying contingency was met, id. 151. Also note the consideration of the 1851 commissioner's report regarding duration after the 1848 treaty. Br. in opp. at 15-16 n.16.

The court of appeals likewise viewed the language in its historical context, not solely in isolation. It considered the historical record of tribal understanding after the 1848 treaty, App. at 18; that the government's express purpose in 1831 was to encourage the Menominee to become farmers and to use the land for settlement, id. at 21; and that because of "this historical context" the court "[could] not ignore plain language." Id.

In sum, the Menominee are blocked by the plain language of the treaties both when standing alone and also when considered in their historical context.

Respectfully submitted,

JAMES E. DOYLE
Attorney General



CHARLES D. HOORNSTRA
Assistant Attorney General
State Bar No. 1010601
Counsel of Record

THOMAS DOSCH
JOHN NIEMISTO
PHILIP PETERSON
Assistant Attorneys General

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9945